JUN 19 1974

In the Supreme Court of the United States

October Term, 1973

No. 73-1897

MICKEY NOWLIN and
ARLENE NOWLIN,
Petitioners,

vs.

PROFESSIONAL AUTO SALES, INC.,
Respondent,

and

DENNIS C. HENSON,
d/b/a M.W.S. RECOVERY SERVICE,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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October Term, 1973

No. _____

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PROFESSIONAL AUTO SALES, INC.,
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and

DENNIS C. HENSON,
d/b/a M.W.S. RECOVERY SERVICE,
Intervenor-Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The petitioners, Mickey Nowlin and Arlene Nowlin respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in these proceeding on April 25, 1974.

OPINION BELOW

The opinion of the United States Court of Appeals, not yet reported, is attached hereto as Appendix A. The opinion of the United States District Court for the District of Nebraska in *Mickey Nowlin and Arlene Nowlin vs. Professional Auto Sales, Inc.*, unreported, is attached hereto as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit was entered on April 25, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the unilateral taking of debtor's property by secured creditors through Nebraska's comprehensive statutory scheme, promoting significant interests governing repossessions, so significantly involves the state in the procedures followed by secured creditors as to constitute acts under color of state law giving rise to an action under Rev. Stat. §1979, 42 U.S.C. §1983 and "state action" under the Fourteenth Amendment of the United States Constitution.

2. Whether Nebraska's statutory scheme of extra-judicial repossession, which fails to provide any of the procedural protections set down by this Court in *Mitchell v. W. T. Grant Co.*, —— U.S. ——, 42 U.S.L.W. 4671 (May 13, 1974), requiring prior judicial intervention before final

disposition of a debtor's property, violates the due process clause of the Fourteenth Amendment.

STATUTORY PROVISIONS INVOLVED

These statutes are reproduced in Appendix C.

1. United States Constitution, Amendment XIV, §1.

2. United States Code, Rev. Stat. §1979, Title 42 §1983, hereinafter referred to a 42 U.S.C. §1983.

3. Nebraska Uniform Commercial Code, §§9-502, 9-503, and 9-504.

4. Revised Statutes of Nebraska, 1943, §§60-111; 69-109 and 69-110.

5. Revised Statutes of Nebraska, 1972 Supplement, §§60-1401.01; 60-1402; 60-1406; 60-1411.01; 60-1411.02; 60-1411.03; and 60-1419.

STATEMENT OF THE CASE

On May 26, 1972, petitioners, husband and wife, purchased a 1967 Plymouth Belvedere automobile from respondent, Professional Auto Sales, Inc., an Omaha used car dealership. Petitioners agreed to purchase the vehicle for $900 and were given a $500 trade-in-allowance on a 1966 Ford station wagon. The respondent required the Nowlins to execute a contract, conforming to Nebraska law, providing for payments of $15 per week until the $400 balance was paid off.

On June 13, 1972, at 10:00 p.m., in the dark of night, respondent's agent acting pursuant to §9-503 of the Nebraska U.C.C. repossessed the Nowlins' automobile which had been parked in front of their home. The following day, petitioners demanded the return of their automobile but respondent refused. Instead, respondent mailed to petitioners on June 21, 1972, a full eight days after repossession, an instrument marked "notice of repossession" which asserted the creditor's right under §9-503 to repossess:

> "Pursuant to Nebraska law, you are hereby notified that unless your account with the above listed Professional Auto's Inc. is brought to date by July 1, 1972, the below listed security mortgaged by you to them will be repossessed by them and sold at private sale without further notice.
>
> "THIS IS A FINAL NOTICE!!"

At the time of the repossession and subsequent notice, petitioners had paid over $560 of the original $900 purchase price.

On June 22, 1972, petitioners filed suit in the United States District Court for the District of Nebraska, Petitioners alleged a claim under 42 U.S.C. §1983[1] attacking the constitutionality of Nebraska's repossession statutes, Nebraska Uniform Commercial Code §§9-503 and 9-504. The original action sought damages, injunctive relief, and a declaratory judgment. On June 28, 1972, a temporary restraining order was issued by the district

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1 The jurisdictional basis for the claim was Rev. Stat. §1979, 28 U.S.C. §1343(3) and (4).

court returning possession of the motor vehicle to petitioners. On July 20, 1972, the Court extended the temporary order pending further hearing. On April 4, 1973, the United States District Court dismissed the complaint on the grounds that the court had no subject matter jurisdiction.

On May 3, 1973, petitioners filed a timely notice of appeal to the United States Court of Appeals for the Eighth Circuit. On April 25, 1974, the United States Court of Appeals affirmed the trial court's dismissal, holding that the Nebraska statutory scheme of repossession did not significantly involve the state in the procedures followed by the respondent to constitute an act under color of state law under 42 U.S.C. §1983.

REASONS FOR GRANTING THE WRIT

I.

Review by this Court is necessary to resolve important issues of Federal Law.

Petitioners have challenged Nebraska's statutory scheme which provides for summary seizure of property. These provisions govern summary repossessions without judicial intervention before final disposition of said property as required by this Court in *Mitchell v. W. T. Grant Co.*, —— U.S. ——, 42 U.S.L.W. 4671 (May 13, 1974). That case traces its genesis to this Court's pronouncement in *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969) declaring pre-judgment garnishment unconstitutional. As a result there has been extensive and widespread federal and state court litigation attacking the constitutionality of various

statutory devices providing for summary seizure of property, Clark & Landers, *Sniadach, Fuentes and Beyond: The Creditor Meets the Constitution*, 59 Va. L. Rev. 355 (1973). Included in this litigation are numerous challenges to summary repossession provisions of Article Nine of the Uniform Commercial Code.[2]

The ramifications of these cases have extended to other areas including attacks on the constitutionality of landlord's liens,[3] garagemen's liens,[4] banker's liens,[5] and wage assignments.[6]

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2 *Adams v. Egley*, 338 F. Supp. 614 (S.D. Cal. 1972), *rev'd sub nom. Adams v. Southern California First Nat'l Bank*, 492 F. 2d 324, (9th Cir. 1973); *reh'g en banc denied* March 21, 1974; *petition for cert. & certiorari filed* June 7, 1974, No. 73-1842; *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 900 (8th Cir. 1973); *Nichols v. Tower Grove Bank*, — F. 2d —, No. 73-1621 (8th Cir. May 13, 1974); *Shirley v. State National Bank*, 493 F. 2d 739, (2nd Cir. 1974); *petition for rehearing en banc denied*, — F. 2d —, — 2nd Cir. March 29, 1974); *Gibbs v. Titelman*, 369 F. Supp. 38 (E.D. Pa. 1973); *appeal docketed* No. 74-1062 (3rd Cir. Jan. 15, 1974); *Turner v. Impala Motors*, No. C-73-50 (W.D. Tenn. 1973); *appeal docketed* No. 73-1826 (6th Cir. Aug. 15, 1973); *James v. Power*, — F. 2d —, — No. 73-1800 (5th Cir. June 10, 1974); *Boland v. Essex County Bank & Trust*, 361 F. Supp. 917 (D. Mass. 1973); and *Michel v. Key Novice*, No. 6729 (D. Vt. 1972).

3 *Hall v. Garson*, 430 F. 2d 430 (5th Cir. 1970); 468 F. 2d 845 (5th Cir. 1972); *Klim v. Jones*, 315 F. Supp. 109 (N.D. Cal. 1970); *Dielen v. Levine*, 334 F. Supp. 823 (D. Neb. 1972); *Holt v. Brown*, 336 F. Supp. 2 (W.D. Ky. 1971); *MacQueen v. Lambert*, 348 F. Supp. 1334 (M.D. Fla. 1972); *Payne v. Walden*, 190 S.E. 2d 770 (W. Va. 1972); and *Blue v. Globe Wernicke Realty Co.*, 347 N.Y.S. 2d 170, 300 N.E. 2d 710 (1973) among other cases.

4 *Hernandez v. European Auto Sales*, 487 F. 2d 378 (2nd Cir. 1973); *Mason v. Garris*, 360 F. Supp. 420 (N.D. Ga. 1973); *Ford v. Dean's O.K. Tire Store*, 2 C.C.H. Pov.L.Rep. 16, 85e (D. Nev. Feb. 9, 1973); *Adams v. Department of Motor Vehicles*, — CA. 3d —, 113 Cal Rptr. 145 (1974) and *Straley v. Cassaway Motor Co., Inc.*, 359 F. Supp. 902 (S.D. W.Va. 1973); *Lee v. Cooper*, No. 74-104 (D. N.J. March 21, 1974) among other cases.

5 *Krasco v. Wells Fargo Bank*, — Cal. 3d —, — Cal Rptr. — (April 26, 1974); *Bichel Optical Laboratories v. Marquette National Bank*, *supra*.

6 *Bond v. Dentzer*, 494 F. 2d 302 (2nd Cir. 1974); *Western v. Hodgson*, 359 F. Supp. 194 (S.D. W. Va. 1973); *Exton v. Michigan Fidelity Loan*, No. C36-72 (W.D. Mich. 1972).

The cases cited represent a variety of decisions in which courts have either found a supposed absence of state action or determined that the challenged statutes violated constitutional guarantees. They do not delineate meaningful state action standards which are applicable to the numerous statutory grants of power to private persons to seize property.

This Court has acknowledged the importance of these state action and due process issues in the case of *Jackson v. Metropolitan Edison Company*, 483 F. 2d 754 (3rd Cir. 1973), *cert. granted*, —— U.S. ——, 94 S. Ct. 1407 (1974). The *Jackson* case involves the practice of a publicly regulated utility company of terminating consumers' utility service outside the judicial process. The issues of state action and due process are present in *Jackson*, as they are in this case, however, the context is different. Petitioners present a controversy which allows the Court to provide a fuller inquiry into the issues raised by a variety state action cases, and for this reason the petition should be granted. In addition, by setting this case for oral argument with *Jackson*, the Court will have an opportunity to explore the complete range of "state action" cases involving denial of due process and thereby render decisions which will set out a comprehensive, principled guide in this area.

II.

The decision of the United States Court of Appeals is erroneous and in conflict with applicable decisions of this Court.

This case involves a comprehensive statutory scheme which significantly involves the State of Nebraska in the objectionable conduct of secured creditors in repossessing a debtor's automobile. In previous decisions this Court has carefully analyzed the relationship between the state and supposedly private acts to determine the applicability of the provisions of the Constitution. These cases evidence an inquiry into the significance of the state interests and policies that intrude upon private relationships in such a way that the private parties by their particular actions reflect the state policy. *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961); *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972).

The state action decisions by this Court reflect a central theme arrived at after a process of "sifting and weighing circumstances"[7] which may be stated as follows:

> "State action is present where a comprehensive statutory framework reflects and introduces state policy into the relationship between private parties so as to define and govern their conduct and give those actions the force of law.

From a review of the state action decisions of this Court, it becomes clear that this central theme emerges in matters

1) involving private parties whose conduct is subjected to pervasive state regulation;[8]

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7 *Burton, supra*, 365 U.S. at 722.

8 *Public Utilities Comm'n v. Pollak*, 343 U.S. 451 (1952); *Burton v. Wilmington Parking Authority, supra*; *Moose Lodge No. 107 v. Irvis, supra*; *Smith v. Allwright*, 321 U.S. 649 (1944); *Terry v. Adams*, 345 U.S. 461 (1953); and *Nixon v. Condon*, 286 U.S. 73 (1932).

2) where private action consists of the performance of traditionally public functions which have been delegated to private individuals;[9]

3) where private action was encouraged or compelled by state law and was reflected in current state policy;[10] and

4) where there is private action taken in reliance upon state law, custom or usage.[11]

The State of Nebraska has by statute developed a framework for secured transactions which so significantly involves the state in the act of repossession as to make the state a virtual partner in respondent's taking of petitioners' automobile.

A brief examination of the pertinent statutes reveals the existence of such a partnership. The provisions of Article Nine of the Nebraska Uniform Commercial Code establish repossession as the cornerstone of a secured transaction framework which guarantees protection to creditors in the event of default and sets out the step by step process to be followed. The creditor alone may determine when a default has occurred. §9-502 Nebraska U.C.C. He is then authorized to accelerate the balance due

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9 *Evans v. Newton*, 382 U.S. 296 (1966); *Marsh v. Alabama*, 326 U.S. 502 (1946); *Smith v. Allwright*, *supra*; *Terry v. Adams*, *supra*; and *United States v. Williams*, 341 U.S. 97 (1950).

10 *Reitman v. Mulkey*, *supra*; *Adickes v. S. H. Kress and Company*, 398 U.S. 144 (1970); *Moose Lodge No. 107 v. Irvis*, *supra*; *Peterson v. City of Greenville*, 373 U.S. 244 (1963); *Lombard v. State of Louisiana*, 373 U.S. 267 (1963); *Robinson v. Florida*, 378 U.S. 153 (1964); *Nixon v. Condon*, *supra*; *McCabe v. Atchinson, Topeka & Santa Fe R. Company*, 235 U.S. 151 (1914); *Evans v. Abney*, 396 U.S. 435 (1970); and *Shelley v. Kraemer*, 334 U.S. 1 (1948).

11 *Adickes v. Kress*, *supra*, and *Evans v. Abney*, *supra*.

on the underlying financial obligation, §9-502 Nebraska U.C.C.; and may repossess the secured property so long as the peace is not breached. §9-503 Nebraska U.C.C. After repossession, the creditor is entitled to sell, lease or otherwise dispose of the secured property, but in order to do so he must first send reasonable notification to the debtor of the time and place of any public sale or the time after which any private sale or other intended disposition is to be made. §9-504(3) Nebraska U.C.C. The sale must be "commercially reasonable." §9-504 Nebraska U.C.C.

The proceeds of any repossession sale may first be applied to the creditor's cost of repossession, holding, preparing, and selling the property. §9-504(1)(a) Nebraska U.C.C. The remainder of the sale price is applied to the balance of the underlying financial obligation. §9-504(2) Nebraska U.C.C.

The effect of this statutory scheme is to create a framework for all repossessions, and indeed in addition to the Nebraska U.C.C., collateral statutes supplemented respondent's power and expedited the repossession process:

1. The State of Nebraska by statute has created the Nebraska Motor Vehicle Licensing Board to regulate all aspects of the used car business. This includes issuance and revocation of licenses. §§60-1401.01 and 1402 R.S. Supp. 1972.

2. Respondent is not allowed to do business as a car dealer without a license. §60-1406 R.S. Supp. 1972.

3. Respondent is required to possess a repossessor's license. §60-1411.01 R.S. Supp. 1972.

4. The Nebraska Motor Vehicle Licensing Board has a statutory obligation to investigate and take corrective action in cases of fraudulent repossessions. §60-1411.02 R.S. Supp. 1972.

5. Advertising of a sale of a repossessed motor vehicle is carefully regulated. §60-1411.03 R.S. Supp. 1972.

6. The respondent must post a $10,000 bond to secure performance of all statutory provisions relating to him and restrictions placed on his license. §60-1419 R.S. Supp. 1972.

7. The clerk of each county is required to expedite the transfer of title of repossessed motor vehicles to secured creditors upon the unilateral declaration of a default. §60-111 R.R.S. 1943.

8. Criminal felony statutes preclude any sale or transfer by the debtor of personal property pledged as security or the taking of property by the debtor out of the county where the property is situated. §69-109 and 110 R.R.S. 1943.

The foregoing statutes reflect the significant interest of the state in the retail sales, financing, and subsequent relationship of the parties to the sale of a motor vehicle.[12]

12 "The Legislature finds and determines that the distribution and sales of motor vehicles . . . in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety, and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle . . . dealers . . . distributors, and their representatives doing business in the State of Nebraska . . ." §60-1401.01 R.S. Supp. 1972.

See also the dissenting opinion of Circuit Judge Hufstedler in the denial of rehearing *en banc* in *Adams v. Southern California 1st Nat'l Bank*, *supra*, recognizing the significant governmental interests and policies promoted by a similar statutory scheme.

Through this statutory scheme the state has delegated specific governmental functions to secured creditors to further traditionally state managed interests. The secured creditor has been designated both a judge and a constable in that he is the sole arbitrator of disputes relating to default and is empowered with authority to seize and sell the personal property in the possession of another person in execution of his own judgment. When the state thus abdicates its traditional role, the conduct of ostensibly private persons may retain all the characteristics of an act of a state, *Evans v. Newton*, 382 U.S. 296, 299 (1966); cf., *United States v. Williams, supra; United States v. Guest*, 383 U.S. 745 (1965); and *United States v. Price*, 383 U.S. 787 (1965).

Petitioners' analysis demonstrates that there exists in Nebraska a comprehensive statutory scheme which puts into effect significant and traditional interests of the state through delegation of the power of the state to private persons. Actions by private persons have the force of law and as a result warrant constitutional scrutiny by this Court.

The repossession statutes, §9-503 and 504 of the Nebraska Uniform Commercial Code are clearly unconstitutional when analyzed in conjunction with the guidelines of this Court in *Mitchell v. W. T. Grant, supra.*

The statutory provisions in *Mitchell* require that an action be filed in a Louisiana Court, affording the debtor an opportunity for a hearing at some point before final resolution of the action. 42 U.S.L.W. at 4672. The Louisiana judge in issuing the writ makes his determination

on the specific showing of the "existence of the debt, the lien, and the delinquence." 42 U.S.L.W. at 4674. The Louisiana sequestration statute under scrutiny in *Mitchell* also requires:

1. A verified petition or affidavit by the creditor showing the existence of a debt, lien, and delinquency. 42 U.S.L.W. at 4673.

2. A showing before a judge. *Id.*

3. The posting of a bond by the creditor to protect the debtor, before a writ will issue. *Id.*

4. An immediate hearing upon debtor's request to consider dissolving the writ with the burden of proof resting on the creditor. *Id.*

5. The debtor to regain possession of the property by posting a bond of his own. *Id.*

This procedure, which has been approved by this Court in *Mitchell*, when applied to the repossession statutes in Nebraska compels a finding that the clandestine seizure of petitioners' property by the respondent in the dark of night violates the most basic concept of due process of law.

CONCLUSION

For the reasons stated above, petitioners pray this

Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Nos. 73-1348 and 73-1450

Mickey Nowlin and Arlene Nowlin,
Appellants,

v.

Professional Auto Sales, Inc.,
Appellee,

and

Dennis Henson, d/b/a M.W.S. Recovery Service,
Intervenor

Appeal from the United States District Court
for the District of Nebraska

No. 73-1450

LeRoy Mayhugh,
Appellant,

v.

Bill Allen Chevrolet Co. and General Motors Acceptance Corp.,
Appellees

App. 2

Appeal from the United States District Court
for the Western District of Missouri

Submitted: November 14, 1973

Filed: April 25, 1974

Before LAY and HEANEY, Circuit Judges, and HARPER, Senior District Judge.*

PER CURIAM

These two cases were consolidated for argument. In each, the issue on appeal is whether the self-help repossession of plaintiffs' motor vehicles, after plaintiffs defaulted on payment contracts which provided for such repossession, were acts under color of state law, thus creating a cause of action under 42 U.S.C. §1983. Plaintiffs' contentions are that enactment of §§9-503 and 9-504 of the Nebraska Commercial Code and §§400.9-503 and 400.9-504 of the Missouri Commercial Code, which authorize self-help repossession, constitute sufficient state involvement to invoke the jurisdiction of the federal courts.

In each case, the district court dismissed the complaint for lack of subject matter jurisdiction, finding that there was no state action. We affirm both judgments.

The facts in the *Nowlin* case need only brief recitation. Plaintiff Nowlin purchased a 1967 Plymouth automobile from defendant Professional Auto Sales. After receiving a $500 trade-in allowance, Nowlin signed an installment sales

* The Honorable Roy W. Harper, United States Senior District Judge, Eastern and Western Districts of Missouri, sitting by designation.

contract for the balance due. When Nowlin defaulted on the payments, defendants, without prior notice or hearing, took the automobile from its parking place in front of Nowlin's home. After defendants refused Nowlin's request to return the automobile, plaintiff Nowlin brought this action, claiming an unconstitutional taking of his property without due process of law.

In the *Mayhugh* case, the facts are basically similar. In October, 1970, Mayhugh purchased a 1970 Chevrolet truck from defendant Bill Allen Chevrolet. Mayhugh traded in a 1969 Plymouth automobile and paid $500.00 in cash. For the balance due, Mayhugh signed an installment sales contract. Defendant Bill Allen Chevrolet assigned this contract to defendant General Motors Acceptance Corporation. Mayhugh made no payments on the contract after November, 1971. During that month, Mayhugh delivered the truck to Bill Allen Chevrolet for repair of the frame, which had become cracked. Allen Chevrolet offered to repair the truck, but Mayhugh refused the type of repair offered. Mayhugh instead demanded replacement or repurchase of the truck by Allen Chevrolet, and threatened legal action if his demand was not met. Mayhugh refused to accept redelivery of the repaired truck. On December 14, 1971, defendant General Motors Acceptance Corporation repossessed the truck for failure to keep up with the payments. At the time of repossession, the truck was parked on the lot of Bill Allen Chevrolet, where plaintiff had delivered it after discovering the cracked frame.[1]

1 Because of these facts, the district court in *Mayhugh*, after first finding no significant state involvement, held alternatively that relief should be denied because Mayhugh had voluntarily abandoned his possessory rights in the truck by rejecting it "in preparation for a suit for damages for breach of the sale agreement, including return of the purchase price." In view of our affirmance on the jurisdictional issue, we have no occasion to consider this alternative holding.

Mayhugh then filed this suit, alleging violation of his due process rights under color of state law.

Recently, in *Bichel Optical Laboratories v. Marquette National Bank*, 487 F. 2d 906 (8th Cir. 1973), we had occasion to consider the issue presented here. The court there held that:

> [T]he State of Minnesota by the mere passage of the Article 9 "self-help" remedies has not so significantly involved itself in the procedures followed by appellee bank as to constitute an act under color of state law giving rise to a §1983 action, *Bichel, supra* at 907.

We adhere to that view in the present cases, *Fuentes v. Shevin*, 407 U.S. 67 (1972), is clearly distinguishable. As we noted in *Bichel*, while *Fuentes* involved the pre-judgment seizure of goods by a state agent pursuant to a writ of replevin, the procedures challenged in *Bichel* and in the instant cases "involve only private actions arising out of the express written agreements between the parties," *Bichel, supra* at 907. *See also Shirley v. State National Bank*, No. 73-1783 (2d Cir. Feb. 14, 1974); *Adams v. Southern California First National Bank*, No. 72-1484 (9th Cir. Oct. 4, 1973); *Kirsey v. Thelig*, 351 F. Supp. 727 (D. Colo. 1972); *Pease v. Havelock National Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Greene v. First National Exchange Bank*, 348 F. Supp. 672 (W.D. Va. 1972); *Oller v. Bank of America*, 342 F. Supp. 21 (N.D. Cal. 1972).

The judgments are affirmed.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

Civil No. 72-0-322

Mickey Nowlin and Arlene Nowlin,
Plaintiffs,

vs.

Professional Auto Sales, Inc.,
Defendant.

Order

This matter comes before the Court on motion of the defendant to dismiss, on the grounds that the Court has no subject matter jurisdiction over the controversy. Having given due consideration to the arguments and briefs of counsel, the Court finds that the motion should be granted, for the reasons set forth by Chief Judge Urbom in *Pease v. Havelock National Bank*, 351 F. Supp. 118 [D. Neb. 1972].

IT IS THEREFORE ORDERED that this case is hereby dismissed.

Dated this 4th day of April, 1973.

BY THE COURT
ROBERT V. DENNEY
United States District Judge

APPENDIX C

United States Constitution, Amendment XIV, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. §1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Nebraska Uniform Commercial Code §9-502(2):

> (2) A secured party who by agreement is entitled to charge back uncollected collateral or otherwise to full or limited recourse against the debtor and who undertakes to collect from the account debtors or obligors must proceed in a commercially reasonable manner and may deduct his reasonable expenses of realization from the collections. If the security

agreement secures an indebtedness, the secured party must account to the debtor for any surplus, and unless otherwise agreed, the debtor is liable for any deficiency. But, if the underlying transaction was a sale of accounts. contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

§9-503:

Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably conveneint to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under section 9-504.

§9-504

(1) A secured party after default may sell, lease or otherwise dispose of any or all of the collateral in its then condition or following any commercially reasonable preparation or processing. Any sale of goods is subject to the article on Sales (article 2). The proceeds of disposition shall be applied in the order following to

(a) the reasonable expenses of retaking, holding, preparing for sale, selling and the like and, to

the extent provided for in the agreement and not prohibited by law, the reasonable attorneys' fees and legal expenses incurred by the secured party;

(b) the satisfaction of indebtedness secured by the security interest under which the disposition is made;

(c) the satisfaction of indebtedness secured by any subordinate security interest in the collateral if written notification of demand therefor is received before distribution of the proceeds is completed. If requested by the secured party, the holder of a subordinate security interest must seasonably furnish reasonable proof of his interest, and unless he does so, the secured party need not comply with his demand.

(2) If the security interest secured an indebtedness, the secured party must account to the debtor for any surplus, and, unless otherwise agreed, the debtor is liable for any deficiency. But if the underlying transaction was a sale of accounts, contract rights, or chattel paper, the debtor is entitled to any surplus or is liable for any deficiency only if the security agreement so provides.

(3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type

customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the debtor, and except in the case of consumer goods to any other person who has a security interest in the collateral and who has duly filed a financing statement indexed in the name of the debtor in this state or who is known by the secured party to have a security interest in the collateral. The secured party may buy at any public sale and if the collateral is of a type customarily sold in a recognized market or is of a type which is the subject of widely distributed standard price quotations he may buy at private sale.

(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor's rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of this part of any judicial proceedings

(a) in the case of a public sale, if the purchaser has no knowledge of any defects in the sale and if he does not buy in collusion with the secured party, other bidders or the person conducting the sale; or

(b) in any other case, if the purchaser acts in good faith.

(5) A person who is liable to a secured party under a guaranty, indorsement, repurchase agreement

or the like and who receives a transfer of collateral fromt he secured party or is subrogated to his rights has thereafter the rights and duties of the secured party. Such a transfer of collateral is not a sale or disposition of the collateral under this article.

Revised Statutes of Nebraska, 1943:

§60-111. Transfer of title by operation of law; new certificate issued; proof required; processing of application. In the event of the transfer of ownership of a motor vehicle by operation of law as upon inheritance, devise or bequest, order in bankruptcy, insolvency, replevin or execution sale, or whenever the engine of a motor vehicle is replaced by another engine, or whenever a motor vehicle is sold to satisfy storage or repair charges, or repossession is had upon default in performance of the terms of a chattel mortgage, trust receipt, conditional sales contract or other like agreement, the clerk of the county in which the last certificate of title to such motor vehicle was issued, upon the surrender of the prior certificate of title or the manufacturer's or importer's certificate, or when that is not possible, upon presentation of satisfactory proof to the county clerk of ownership and right of possession to such motor vehicle, and upon payment of the fee prescribed in this act, and the presentation of an application for certificate of title, may issue to the applicant a certificate of title thereto. Only an affidavit by the person, or agent of the person to whom possession of such motor vehicle has so passed, setting forth facts entitling him to such possession and ownership, together with a copy of the journal entry, court order, or instrument upon which such claim of possession and ownership is founded, shall be considered satisfactory proof of ownership and right of possession. If the applicant cannot produce

such proof of ownership, he may apply directly to the Department of Motor Vehicles and submit such evidence as he may have, and the department may thereupon, if it finds the evidence sufficient, authorize the county clerk to issue a certificate of title. If, from the records in the office of the county clerk, there appear to be any lien or liens on such motor vehicle, such certificate of title shall contain a statement of such liens unless the application is accompanied by proper evidence of their satisfaction or extinction. If the county in which the last certificate of title to such motor vehicle was issued cannot be determined, the application for title shall be processed by the clerk of the county where the court entering the journal entry or order is located or the county where the instrument was executed upon which such claim of possession and ownership is founded, as the case may be.

§69-109. Security interest; personal property; sale or transfer without consent; penalty. Any person who, after having created any security interest in any article of personal property, either presently-owned or after-acquired, for the benefit of another, shall, during the existence of the security interest, sell, transfer, or in any manner dispose of the said personal property, or any part thereof so given as security, to any person or body corporate, without first procuring the consent, in writing, of the owner and holder of the security interest, to any such sale, transfer or disposal, shall be deemed guilty of a felony, and upon conviction thereof shall be fined in any sum not less than one hundred dollars or imprisoned in the Nebraska Penal and Correctional Complex for a term not less than one year nor more than ten years, or be both so fined and imprisoned.

§69-110. Security interest; personal property; removal from county; penalty. Any person who, after having created any security interest in any article of personal property, whether presently-owned or after-acquired, for the benefit of another, shall, during the existence of such interest, remove, permit, or cause to be removed, said property or any part thereof out of the county within which such property was situated with intent to deprive the owner or owners of the security interest of his or their security, shall be deemed guilty of a felony, and upon conviction thereof shall be imprisoned in the Nebraska Penal and Correctional Complex for a term not exceeding ten years, and be fined in a sum not exceeding one thousand dollars.

Revised Statutes of Nebraska, 1972 Supplement:

§60-1401.01. Declaration of intent. The Legislature finds and declares that the distribution and sales of motor vehicles, motorcycles, and trailers in the State of Nebraska vitally affects the general economy of the state, the public interest, the public welfare, and public safety and that in order to promote the public interest and the public welfare and in the exercise of its police power, it is necessary to regulate motor vehicle, motorcycle, and trailer dealers, manufacturers, distributors, and their representatives doing business in the State of Nebraska.

The Legislature further finds that the sales of motor vehicles, motorcycles, and trailers are involved to a large extent in a franchise system established between manufacturers and dealers and hereby declares that the sale of motor vehicles, motorcycles, and trailers to the public in the state under the franchise system includes more than the mere transfer

of title, being a continuing obligation of the manufacturer, distributor and dealer to the buying public affecting the public interest; that the termination or failure of the established relationship between the manufacturer, distributor and dealer without cause or good faith denies to the general buying public its right to availability of continuing post-sale mechanical and operational services and precludes the relationship, expected and implied at the time of sale, between the buyer and the seller necessary to insure safe operating condition of the vehicle.

The Legislature further finds and declares that the distribution and sale of motor vehicles in the state under the franchise system vitally affects commerce, the general economy of the state and the welfare of the citizens of the state requiring the exercise of its police power to insure the public welfare, to regulate commerce, to establish guidelines for enforcement of a fair and equitable balance between parties to such franchises, and to provide judicial relief from unfair and inequitable practices affecting the public interest.

§60-1402(1) reads in pertinent part:

(1) There is hereby established the Nebraska Motor Vehicle Industry Licensing Board

* * *

§60-1406(1)(2) and (8):

Licenses; classes. Licenses issued by the board under the provisions of sections 60-1401 to 60-1419 shall be of the classes hereinafter set out and shall permit the following described business activities:

(1) Motor vehicle dealer's license. This license shall permit the licensee to engage in the business of selling or exchanging new, used, or new and used motor vehicles and trailers as defined in section 60-1401.02, at the established place of business designated in such license and another place or places of business located within three hundred feet of such designated place of business, and within the city or county described in such original license. This license shall permit one person, either the licensee, if he is the individual owner of such licensed business or a stockholder, officer, or co-partner of such licensee to act as a motor vehicle and trailer salesman and the name of such authorized person shall appear on the license;

(2) Motor vehicle, motorcycle, or trailer salesman license. This license shall permit the licensee to engage in the activities of a motor vehicle, motorcycle, or trailer salesman as defined in section 60-1401.02. This license shall permit the one person named thereon to act as a salesman;

* * *

(8) Finance company license. This license, as defined in section 60-1401.02, shall permit the licensee to engage in the activities of repossession of motor vehicles or trailers and the sale of such motor vehicles or trailers so repossessed;

§60-1411.01. Administration; enforcement; fees. To pay the expenses of the administration, operation, maintenance, and enforcement of this act, the board shall collect with each application for each class of license fees not exceeding the following amounts: (1) Motor vehicle dealer's license, ten dollars; (4) motor

vehicle, motorcycle, or trailer salesman's license, three dollars; (9) finance company's license, thirty-five dollars; which fees shall be fixed by the board and shall not exceed the amount actually necessary to sustain the administration, operation, maintenance, and enforcement of this act. Fifteen dollars of the license fee for each dealer's license of any class shall be an inspection fee, and shall not be refunded if the application is denied because of the applicant's failure to meet the requirements of this act. Such licenses, if issued, shall expire on December 31 next following the date of the issuance thereof. Any motor vehicle, motorcycle or trailer dealer changing its location shall not be required to obtain a new license if the new location is within the same city limits or county provided all requirements of law are complied with and a fee of ten dollars is paid, but any change of ownership of any licensee shall require a new application for a license and a new license. Change of name of licensee without change of ownership shall require the licensee to obtain a new license and pay a fee of five dollars. Applications shall be made each year for a new or renewal license.

§60-1411.02. Licensee; investigation. The board may, upon its own motion, and shall, upon a sworn complaint in writing of any person, investigate the actions of any person licensed as a motor vehicle dealer, trailer dealer, motor vehicle or trailer salesman, manufacturer, factory branch, distributor, wholesaler, factory representative, distributor representative, supplemental motor vehicle dealer, wrecker or salvage dealer, finance company, motorcycle dealer or motor vehicle auction dealer. It shall have the power to deny any application for a license or to revoke or suspend any license issued under the provisions of this act when the applicant or licensee including any officer,

stockholder, partner, or any person having any financial interest in the applicant or licensee:

(1) Has had any license, issued to him under the provisions of this act, revoked or suspended and, if the license has been suspended, has not complied with the terms of suspension;

(2) Has knowingly purchased, sold or did business in stolen motor vehicles, motorcycles, or trailers or parts therefor;

(3) Has failed to provide and maintain an established place of business as defined in section 60-1401.02;

(4) Has been found guilty of any felony which has not been pardoned, has been found guilty of any misdemeanor concerning fraud or conversion, or has suffered any judgment in any civil action involving fraud, misrepresentation or conversion; or, in the event felony charges are pending against an applicant, then no license shall be issued to an applicant until there has been a final determination of the charges;

(5) Has made a false material statement in his application or any data attached thereto;

(6) Has willfully failed to perform any written agreement with any consumer or retail buyer;

(7) Has made a fraudulent sale, transaction, or repossession, or created a fraudulent security interest, as defined in the Uniform Commercial Code, in a motor vehicle, trailer, or motorcycle;

(8) Has failed to notify the board of a change in the address of his established place or places of business and in the case of a salesman has failed to notify the board of any change in his employment;

(9) Has willfully failed to deliver to a purchaser a proper certificate of ownership for a motor vehicle, trailer, or motorcycle sold by the licensee;

(10) Has forged the signature of the registered or legal owner on a certificate of title;

(11) Has failed to comply with the provisions of this act and any orders, rules or regulations of the board promulgated under the act;

(12) Has failed to comply with the advertising and selling standards established in section 60-1411.03;

(13) Has failed to comply with the provisions of section 60-320, Chapter 60, article 1, the provisions of this act or rules or regulations promulgated by the board under the provisions thereof; or

(14) Has wilfully defrauded any retail buyer, or other person, in the conduct of the licensee's business.

§60-1411.03 (12) Unauthorized acts. It shall be unlawful for any licensee to engage, directly or indirectly, in the following acts;

* * *

(12) To advertise the words Finance, Loan, Discounts, or others of similar import, in the firm

name or trade style of a person offering motor vehicles, motorcycles and trailers for sale, unless such person is actually engaged in the finance business and offering only bona fide repossessed motor vehicles, motorcycles and trailers; *Provided*, that it is unlawful to use the word Repossessed in the name or trade style of a firm in the advertising of motor vehicles, motorcycles and trailers sold by such a company unless they are bona fide repossessions sold for unpaid balances due only; and *provided further*, that advertisers offering repossessed automobiles for sale must be able to offer proof of repossession;

§60-141º. Dealer's license; bond; conditions. Applicants for a motor vehicle dealer's license, trailer dealer's license, wholesaler's license, or motorcycle dealer's license shall, at the time of making application, furnish a corporate surety bond in the penal sum of ten thousand dollars, and applicants for a motor vehicle auction dealer's license shall at the time of making application furnish a corporate surety bond in the penal sum of one hundred thousand dollars, on a form to be prescribed by the Attorney General of the State of Nebraska. The bond shall provide (1) that the applicant will faithfully perform all the terms and conditions of said license, (2) that the licensed dealer will fully indemnify any person or other dealer by reason of any loss suffered because of (a) the substitution of any motor vehicle or trailer other than the one selected bythe purchaser, (b) the dealer's failure to deliver to the purchaser a clear and marketable title, (c) the dealer's misappropriation of any funds belonging to the purchaser, (d) any alteration on the part of the dealer as to deceive the purchaser as to the year model of any motor vehicle or trailer, and (e) any false and fraudulent representations

or deceitful practices whatever in representing any motor vehicle or trailer, and (3) that the motor vehicle, motorcycle, motor vehicle auction, or trailer dealer or wholesaler shall well, truly, and faithfully comply with all the provisions of his license and the acts of the Legislature relating thereto. The aggregate liability of the surety shall in no event exceed the penalty of said bond.

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IN THE

Supreme Court of the United States

No. 73-1897

MICKEY NOWLIN and ARLENE NOWLIN,
Petitioners,

vs.

PROFESSIONAL AUTO SALES, INC.,
Respondent,

and

DENNIS C. HENSON,
d/b/a M. W. S. RECOVERY SERVICE,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

No. 73-1897

MICKEY NOWLIN and ARLENE NOWLIN,
Petitioners,

vs.

PROFESSIONAL AUTO SALES, INC.,
Respondent,

and

DENNIS C. HENSON,
d/b/a M. W. S. RECOVERY SERVICE,
Intervenor-Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

QUESTIONS PRESENTED

Respondent does not accept the questions as set forth in Petitioner's brief. Rather the question for this Court's consideration is as it was presented by Petitioner, and accepted by Respondent, in the Court of Appeals, to wit:

> "Whether the appellee (respondent in this Court), a secured creditor, when it repossessed appellant's (petitioner in this Court) automobile, a secured chattel, acted under color of law within the ambit of 28 USCA Section 1343 for the purpose of obtaining jurisdiction of the Court below, and whether it acted under color of law within the ambit of 42 USC Section 1983 for the purpose of alleging a valid cause of action in the Court below."

Question number two in Petitioner's brief was never considered nor was it an issue before either the trial court or the 8th Circuit Court of Appeals.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to those statutes mentioned in Petitioner's brief, 28 USC Section 1343 (3) and (4) were alleged and relied on by Petitioner for its jurisdictional basis in the Federal District Court.

Respondent takes exception to the citation by Petitioner of Section 9-502 of the Nebraska Uniform Commercial Code since this Section deals with accounts receivable financing which is not here involved and was not previously cited, relied upon or challenged by Petitioner in the Court of Appeals or the District Court.

———o———

STATEMENT OF THE CASE

Respondent further does not accept the statement of Petitioner that Respondent's agent acted "pursuant to Section 9-503 of the Nebraska UCC" in repossessing the Nowlins' automobile. Such action arose out of the respective rights conferred upon the parties in the installment sale contract, freely entered into by both parties, on May 6, 1972, and which was simply permitted by Section 9-503 of the Nebraska UCC.

———o———

ARGUMENT

I.

Those courts of appeal which have decided the issue presented in this case have decided it favorably to the respondent, Professional Auto Sales, Inc.

One of the considerations governing review on certiorari is whether "a Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals on the same matter. . . ."[1] In the instant case there are no conflicting decisions in the Courts of Appeal on the question presented. Four Courts of Appeal have ruled on the issue and have all held that self-help repossession as permitted by Section 9-503 of the UCC does not constitute State action within the purview of the 14th Amendment.

These Circuits, and their decisions, are:

2nd Circuit—*Shirley vs. The State National Bank of Connecticut*, 493 F. 2nd 739 (1974) petition for rehearing *en banc* denied March 29, 1974, — F. 2nd —.

5th Circuit—*James vs. Pinnix*, — F. 2nd — (June 10, 1974, No. 73-1866).

8th Circuit—*Nourlin vs. Professional Auto Sales, Inc.*, — F. 2nd — (April 25, 1974, No. 73-1348) and its companion case *Maghugh vs. Bill Allan Chevrolet*, — F. 2nd — (April 25, 1974, No.

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1 Rule 19, Rules of the Supreme Court of the United States.

73-1450); *Nichols vs. Tower Grove Bank*, — F. 2nd — (May 13, 1974, No. 73-1621).[2]

9th Circuit—*Adams vs. Southern California National Bank*, 492 F. 2d 324 (1974).

One other Circuit has rendered an analogous decision. The First Circuit in the case of *Fletcher v. Rhode Island Hospital Trust National Bank, et al.*, — F. 2nd — (May 9, 1974, No. 73-1372) has held that the right of setoff, exercised by a bank, does not constitute State action. The Plaintiffs there charged that State action was present based upon Rhode Island's regulatory involvement in the banking industry and its allowance of bank setoffs. The Court stated, in denying State action, that:

> "As did the District Court, and as have most other Federal courts, including the Second, Eighth and Ninth Circuits, in analogous self-help cases, we conclude that the challenged action was private, not state, and so we affirm the dismissal of Count One."

The First Circuit relied on such cases as *Adams* and *Shirley, supra*, and the myriad of Federal District Court cases which dealt specifically with the constitutionality of 9-503 of the Uniform Commercial Code. It, therefore, seems reasonable to conclude that the First Circuit has charted its course on the subject issue in the same direction as the 2nd, 5th, 8th and 9th Circuits.

Within the Circuits which have not decided the issue, the District Courts considering the question have nearly

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2 See also **Bichel Optical Lab, Inc. vs. Marquette National Bank of Minneapolis**, 487 F. 2nd 906 (1973), which held that there was no State action under the self-help remedies of Article 9 of the Uniform Commercial Code in a factual situation involving a security interest on accounts receivable.

uniformly gone the way of the other Circuits.[3]

The State Supreme Courts which have decided the issue have also determined that there is no State action involved in self-help repossession under Section 9-503 of the UCC. *Brown vs. United States National Bank of Oregon*, 509 P. 2nd 442 (Ore. Sup. Ct., 1973); *Northside Motors of Florida, Inc., vs. Brinkley*, 282 So. 2nd 617, (Sup. Ct. Fla., 1973).

Not only is there no conflict of authority on this issue within the Circuits, but the trend of authority clearly is in favor of the decision rendered by the Eighth Circuit Court of Appeals in this case. A review by this Court is, therefore, not necessary to resolve a conflict between subordinate Courts and jurisdictions.

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3 **FOURTH CIRCUIT—Greene vs. First National Exchange Bank,** 348 F. Supp. 672 (W. D. Va. 1972); **Pequese v. Ford Motor Credit Co.,** — F. Supp. — (So. Car., June 14, 1974, CA — 73-771); **McDuffy et al., vs. Worthmore Furniture, Inc., et al.,** — F. Supp. — (E. D. Va. July 9, 1974, No. 73-426-R).

SIXTH CIRCUIT—Turner vs. Impala Motors, — F. Supp. —, (W. D. Tenn., 1973, No. C-73-50), presently on appeal to the Sixth Circuit Court of Appeals, No. 73-1826. **Kinch vs. Chrysler Credit Corp.,** 367 F. Supp. 436, (E. D. Tenn., 1973). **Huber vs. Union Planners National Bank,** — F. Supp. —, (W. D. Tenn., 1973, No. 72-264). **Qualls vs. Ford Motor Credit Corp.,** — F. Supp. — (E. D. Tenn., 1973, No. 6860).

SEVENTH CIRCUIT—Johnson vs. Associates Finance, Inc., 365 F. Supp. 1380, (S. D. Ill., 1973).

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D. C. CIRCUIT—No cases of which Respondent is aware.

But see **THIRD CIRCUIT—Gibbs vs Titelman,** 369 F. Supp. 38, (E. D. Pa. 1973), decided contra but presently on appeal to the Third Circuit Court of Appeals, Nos. 74-1063 and 74-1064

II.

The decision below is correct, and is consistent with prior Supreme Court decisions on the question presented.

The State Action Issue

Petitioners rely on a trio of cases decided by this Court as the foundation of their attack on Section 9-503 of the Nebraska Uniform Commercial Code. *Fuentes vs. Shevin*, 407 U. S. 67 (1972); *Sniadach vs. Family Finance Co.*, 395 U. S. 337 (1969); and the most recent of the three, *Mitchell vs. W. T. Grant Co.*, — U. S. —, 42 U. S. Law Week 4671 (May 13, 1974). Each of these cases dealt with the constitutionality of prejudgment creditor remedies implimented by state agents without prior notice and hearing to the debtor.

The *Fuentes and Sniadach* cases gave the initial impetus to a wave of cases across the country attacking replevin, garnishment, and similar types of remedies. However, these cases, and the *Mitchell case*, did not involve the "State action" question now before this Court because State officials were directly involved in carrying out the challenged creditor remedy.

In *Sniadach*, which invalidated the Wisconsin wage garnishment statute under the due process clause, wages were frozen upon the initiation of a lawsuit in the State Court, and the issuance of an appropriate summons upon the garnishee by the Clerk of the Court. In *Fuentes*, prejudgment replevin statutes in Florida and Pennsylvania

were declared unconstitutional, where these laws authorized summary seizure of goods and chatteis by State agents upon the creditors ex parte application to a State Court. In *Mitchell*, where this Court held the Louisiana sequestration statute constitutional, State action was not involved because there again the writ of sequestration was issued by a State Court and carried out by State officials.

In complete contrast, the instant case involves repossession of an automobile based upon an installment sale contract entered into between two private individuals, without the involvement of State officials, power or process. Therefore, lacking the essential prerequisite of State action, the due process clause of the Fourteenth Amendment is not applicable.[4]

Nevertheless, Petitioners attempt to move immediately to the due process question without consideration of the essential prerequisite of State action. Their citation and reliance on the *Mitchell* case is premature and incorrect.

The only issue before the District Court, the Court of Appeals, and now this Court, is whether a private creditor's exercise of his right of self-help repossession consti-

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4 Petitioners have relied on 28 USC 1343(3) and 42 USC 1983 in their attempt to secure jurisdiction of the Federal Court and allege a cause of action based upon a deprivation of their constitutional rights. On both counts, the proof of "State action" is a prerequisite.

tutes State action. Respondent respectfully submits that the previous decisions on the question of State action by the Court do not need further delineation and are consistent with the lower Court's decision in this case.

The State Action Cases

In their Petition for Writ, and in the Court of Appeals, Petitioners have generally relied most heavily upon three State action arguments: First, there has been such pervasive State regulation and the State has so far insinuated itself into a position of interdependence with the creditor that it must be regarded as a "joint participant" in the challenged activity; secondly, the creditor in repossessing is performing an essentially governmental function of the State; and, thirdly, the actions, laws or customs of the State are such that they encourage, require or compel the challenged action by the creditor.

Most, if not all, of the leading cases cited by Petitioners, involve the Court's attempt to eliminate the pervasive evil of racial discrimination. The often subtle, but traditional manner in which the State supported and compelled discrimination, has required the Court to carefully sift the facts and weigh the circumstances of each case to clearly define the State's involvement. In the instant case, which does not involve any of the considerations of racial discrimination or any of the subtleties of those cases, there is clearly no "State action" even when judged

by the most stringent gauges of State action that this Court has employed.

In support of their first argument, Petitioners rely upon the leading case of *Burton vs. Wilmington Park Authority*, 365 U. S. 715 (1961). There, a private restaurant was charged with racial discrimination. The restaurant was located, however, in a publicly owned and operated building which had been built and was maintained with public funds for public purposes and was leased by the State to the offending private party. This Court held that:

> "The State has so far insinuated itself into a position of interdependence with . . . (the restaurant) that it must be recognized as a joint participant in the challenged activity. . . ."

In the instant case, there is no public ownership, public funds, or public business enterprise to support any significant State involvement or participation in the repossession of the Nowlin's automobile.

Further, the leading case of *Moose Lodge No. 107 vs. Irvis*, 407 U. S. 163 (1972), recognized that mere licensing and regulation of private individuals and businesses by a State does not constitute State action. The *Moose Lodge* case involved the stringent licensing and regulation procedures normally associated with the retail sale of liquor. It is noteworthy that in the case at bar, Petitioners place much reliance upon the regulation and licensing of used car dealers and repossessors, in claiming State action.

The cases relied upon by Petitioners in support of their "public function" or "governmental function" argument are also not applicable here. They involve the abdication, or delegation, of traditional duties of government to private individuals. The cases relied upon by Petitioners involve such traditional functions of the State as the election process[5], law enforcement[6] and the public administration of public facilities.[7] In contrast, the challenged action here is repossession by self-help, which is a traditional common law activity that has never been performed by the State. Indeed, by its own definition, self-help is not a public or governmental function. This Court, in *Fuentes*, at least inferentially recognized this distinction in a footnote to a discussion of the replevin statutes when it stated:

> "The creditor could, of course, proceed *without the use of State power*, through self-help, by 'distraining' the property before a judgment." (See footnote 12 of *Fuentes* decision.) (Emphasis added.)

Thirdly, the leading case relied upon by Petitioners in support of their third argument is *Reitman vs. Mulkey*, 387 U. S. 369 (1967). Petitioners relied heavily on this case in the Court of Appeals contending that it stands for the proposition that mere encouragement of activity by private individuals, through the enactment of a State law,

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5 **Smith vs. Allright**, 321 U. S. 369 (1944); **Terry vs. Adams**, 345 U. S. 361 (1953).

6 **U. S. vs. Williams**, 341 U. S. 97 (1950).

7 **Evans vs. Newton**, 382 U. S. 296 (1966); and **Marsh vs. Alabama**, 326 U. S. 501 (1946), also cited by Petitioners which involved a "company town" which had all of the characteristics of any other American town except it was privately owned.

is State action. However, in *Reitman*, a constitutional amendment was enacted which overturned existing fair housing legislation and effectively prevented the State Legislature from enacting such future legislation. The result was to foreclose racial minorities from the political process and directly prevent any future expression by the Legislature on that subject. Passage of the constitutional amendment was, therefore, not a neutral expression by the State, but made the "right to discriminate . . . one of the basic policies of the State", 387 U. S. at p. 381.

On the other hand, passage by the State of Nebraska of 9-503 is purely neutral and in no way compulsory. It does not create basic new rights or foreclose the exercise of existing rights. It merely codifies, or recognizes, an existing remedy of the common law. If 9-503 were to be repealed, the common law right of self-help repossession would still be available. Petitioners would, in effect, deny the State even a neutral position on the doctrine of self-help by repossession.

Other cases cited in support of Petitioner's third argument are also clearly distinguishable from the case at bar.[8] Section 9-503 in no way compelled or required the challenged repossession by Respondent.

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8 **Adickes vs. S. H. Kress & Co.**, 398 U. S. 144 (1970) (State enforced custom which compelled private restaurants to refuse service to Caucasians while in the company of Negroes); **Moose Lodge No. 107 vs. Irvis**, supra (State required enforcement of racially discriminating by-law); **Peterson vs. City of Greenville**, 373 U. S. 244 (1963) (State statute requiring separation of races in restaurants); **Lombard vs. State of Louisiana**, 373 U. S. 267 (1963) (Official command by city of

Traditional Role of Fourteenth Amendment

The decision of the lower court in this case is clearly consistent with the prior decisions of this Court and the traditional role of the Fourteenth Amendment. This Court has emphasized and re-emphasized that state action will not be found in the purely private conduct of the individual, however wrongful, voluntarily engaged in without some form of active assistance or cooperation on the part of the State. For example, in *Shelley v. Kraemer*, 334 U. S. 1 (1948), the Supreme Court held:

> "Since the decision of this Court in the Civil Rights cases, 109 U. S. 3, 27 L. Ed. 834, 3 S. Ct. 18 (1883), the principal has become firmly embedded in our Constitutional law that the action inhibited by the first section of the 14th Amendment is only such action as may fairly be said to be that of the States. *That Amendment erects no shield against merely private conduct, however discriminatory or wrongful.*" (334 U. S. at 13.) (Emphasis added.)

In support of this basic theme, Justice Harlan in *Boddie v. Connecticut*, 401 U. S. 371 (1971), observed that the limitations of the Due Process Clause do not apply to

(Continued from previous page)

ficials having the coercive effect of an ordinance directing the continuation of segregated service in restaurants); **Robinson vs. Florida,** 378 U. S. 153 (1964) (State regulation requiring segregation); **Nixon vs. Condon,** 286 U. S. 73 (1932) (State statute delegating power to private individuals limited participation to white persons); **McCabe vs. Atchison, Topeka, and Santa Fe Railroad Company,** 235 U. S. 151 (1914) (State law compelled segregation on common carriers without providing equal facilities); **Evans v. Abney,** 396 U. S. 435 (1970) (Following **Evans vs. Newton, supra,** and also concluding that the neutral and non-discriminatory enforcement of State laws did not violate 14th Amendment); **Shelley vs. Kraemer,** 334 U. S. 1 (1948) (Judicial enforcement of a racially restrictive covenant to force the private party to discriminate against his will.)

the private structuring of individual relationships and the private repair of their breach:

> "(O)ur society has been so structured that resorts to the Courts is not usually the only available, legitimate means of resolving private disputes. Indeed, private structuring of individual relationships and repair of their breach is largely encouraged in American life, subject only to the caveat that the formal judicial process, if resorted to, is paramount." 401 U. S. at 375.

Thus, the distinction between State or public action, subject to the strictures of the Fourteenth Amendment, and private action or conduct which is not regulated by the Constitution has long been recognized by this Court. This case falls clearly within the latter category. A contrary holding would obliterate the line of demarcation between State action and private conduct. It would be inconsistent with the Court's prior decisions, and would signal a much broader application of the Due Process Clause in areas which have traditionally clearly involved private conduct, even though the State has enacted laws permitting such activity. The making of a will, entering into a contract, forming a corporation, and the whole spectrum involving private conduct and individual relationships would suddenly be raised to the level of constitutional significance.

Respondent believes that this Court's decisions are not in conflict with the holding of the Court of Appeals below. The Eighth Circuit's decision in this case fits clearly within the pattern of the State action cases that this Court has decided.

Petitioners have suggested on page 7 of their brief that, if certiorari is granted in this case, it should be set

for oral argument with *Jackson vs. Metropolitan Edison Company*, 483 F. 2nd 754 (3rd Cir. 1973), cert. granted — U. S. —, No. 73-5845, presently pending for oral argument in this Court. That case involves the question of whether a public utility's termination of electrical service due to nonpayment of a bill is State action. Respondent submits that the factual situation in *Jackson* and in the instant case is so significantly different that consolidation for argument or decision would not be helpful. In this case, the challenged conduct arose out of rights flowing from a private agreement between two parties, whereas in the *Jackson* case it arose out of a regulation enacted by the public utility. Moreover, the challenged conduct in *Jackson* was undertaken by a publicly created monopoly, whereas in *Nowlin* the activity was by a private entity which is not vested with the powers and responsibilities of a public utility.

———o———

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for a Writ of Certiorari be denied in this case and the decision of the United States Court of Appeals for the Eighth Circuit be allowed to stand.

Respectfully submitted.

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SUPREME COURT, U. S.
FILED
OCT 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 73-1897

MICKEY NOWLIN and ARLENE NOWLIN,
Petitioners,

vs.

PROFESSIONAL AUTO SALES, INC.,
Respondent,

and

DENNIS C. HENSON,
d/b/a M. W. S. RECOVERY SERVICE,
Intervenor-Respondent.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

SUPPLEMENTAL BRIEF

I.

PRELIMINARY STATEMENT

On July 17, 1974, Respondent, Professional Auto Sales, Inc. (hereafter referred to as "Auto Sales"), filed its Brief in Opposition to Petition for a Writ of Certiorari in the instant case. This "Supplemental Brief" is filed pursuant to Rule 24 (5) of the Rules of the Supreme Court of the United States which provides that a party may file a Supplemental Brief "calling attention to new cases . . . not available at the time of his last filing."

Below, we have cited and discussed briefly certain new cases not included in our Brief in Opposition. These decisions, which are presently unreported, have been reprinted in an appendix to this Supplemental Brief for the convenience of the Court.

II.

ARGUMENT

In Auto Sales' Brief in Opposition to Petition for a Writ of Certiorari, previously filed herein, it was argued under point 1 that there is no conflict in the decisions of the Circuit Courts of Appeals on the question presented. It was pointed out to the Court that the Second, Fifth, Eighth and Ninth Circuits had all decided the precise question presented to this Court favorably to Auto Sales.

Since that time, the Courts of Appeals for the Third and Sixth Circuit also have decided the issue favorably to the position of Auto Sales. In *Gibbs, et al. v. Titelman, et al.*, (Aug. 1, 1974, Nos. 74-1062 to 74-1067)[1] the United States Court of Appeals for the Third Circuit was presented with the issue of the constitutionality of certain provisions of the Pennsylvania Motor Vehicle Sales Finance Act, and Sections 9-503 and 9-504 of the Pennsylvania Uniform Commercial Code. The appellees in that case successfully argued in the District Court that the statutes were unconstitutional as they permitted creditors to repossess automobiles without resort to judicial process. The Third Circuit in the attached decision reversed the District Court and held that peaceful repossession, as permitted by Sections 9-503 and 9-504 of the Uniform Commercial Code, was not sufficient state involvement to constitute "State action" under the Fourteenth Amendment and Sections 42 U. S. C. 1983 and 1343 under which the action was brought.

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1 See Appendix I.

In *Turner v. Impala Motors* (Sept. 20, 1974, No. 73-1826)[2] the Court of Appeals for the Sixth Circuit was also presented with the issue of whether or not self-help repossession by private parties under Section 9-503 of the Uniform Commercial Code (Section 47-9503 Statutes of the State of Tennessee) constitutes state action within the meaning of the due process clause of the Fourteenth Amendment. The Court, consistent with all other Circuit Courts of Appeals that have decided the issue, held that such conduct did not constitute state action and affirmed the decision of the District Court.

With the reversal of the District Court decision in *Gibbs*, and the affirmance of the District Court decision in *Turner*, footnote 3 on page 5 of our Brief in Opposition requires a change. The Third Circuit can no longer be listed as represented by a single District Court case holding Section 9-503 unconstitutional and, the reference to the Sixth Circuit is no longer relevant since that Circuit is now governed by its Court of Appeals decision in *Turner*. In the remaining Circuits where this issue has not yet reached the respective Circuit Courts of Appeals, it appears that the District Court decisions in each Circuit are favorable to the position of Auto Sales. The only exception is the District of Columbia Circuit which has not yet decided the issue insofar as the Respondent is aware.

The Court's attention is further directed to the decision of *Bowman v. Chrysler Credit Corporation*, — F. 2d — (July 10, 1974, No. 72-3683)[3] in which the Fifth Cir-

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2 See Appendix II.

3 See Appendix III.

cuit, in a per curiam decision, followed its previous decision in *James v. Pinnix*, — F. 2d —, (June 10, 1974, No. 73-18866), in holding that the self-help repossession of an automobile pursuant to a conditional sales contract under Mississippi law did not violate the Due Process clause of the Fourteenth Amendment.

Finally, in addition to those State Supreme Courts, cited on page 5 of our Brief in Opposition, the Supreme Court of the State of Colorado has rendered two (2) relevant decisions En Banc concerning the issue of state action. In the case of *John Deere Company of Kansas City v. John Catalano*, — P. 2d — (Sept. 3, 1974, No. 26328)[4] the Court held no state action in the peaceable repossession and sale of security under Section 9-503 of the Uniform Commercial Code. The Court further held in the case of *Rosa E. Sifuentes v. Hugh C. Weed, Jr., et al.*, — P. 2d — (Sept. 3, 1974, No. 26400)[5] that the issuance of certificates of title to motor vehicles to repossessors of motor vehicles pursuant to Colorado statutes did not constitute state action under the Fourteenth Amendment.

Respectfully submitted,

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4 See Appendix IV.

5 See Appendix V.

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APPENDIX I

HARRY H. and THELMA GIBBS; and ELLA LEMAR, on Their Own Behalf and on Behalf of All Others Similarly Situated, et al.,

vs.

WILLIAM A. TITELMAN, Individually and as Director of the Bureau of Motor Vehicles of the Commonwealth of Pennsylvania, et al.

HUNTER, *Circuit Judge:*

This is an appeal from the judgment of the United States District Court for the Eastern District of Pennsylvania declaring unconstitutional certain provisions of the Pennsylvania Motor Vehicle Sales Finance Act ("MVSFA")[1] and the Pennsylvania Uniform Commercial Code ("UCC")[2] insofar as they permit creditors to repossess automobiles peaceably without resort to judicial process upon default by debtors.[3] This Court has jurisdiction pursuant to 28 U. S. C. §§ 2201 & 1291. We reverse.

This case was tried as a class action under the Civil Rights Act, 42 U. S. C. §§ 1983 & 1343 based upon the

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1 The sections in question are: 69 Pa. Stat. § 623 (Repossession), § 624 (Reinstating of Contract After Repossession), § 625 (Redemption and Termination of Contract After Repossession), § 626 (Sale of Motor Vehicle After Repossession), and § 627 (Deficiency Judgment).

2 The sections in question are: 12A Pa. Stat. § 9-503 (Secured Party's Right to Take Possession After Default), and § 9-504 (Secured Party's Right to Dispose of Collateral After Default; Effect of Disposal).

3 Appellants contend that the district court's judgment is even broader in scope, but in view of our disposition of this case, we need not reach this question.

claim that the repossessions of automobiles subject to security interests were made under "color of . . . State law, statute, ordinance, regulation, custom or usage"[4] and in violation of due process because effected without notice and opportunity for a hearing.

Each of the named appellees financed the purchase of an automobile either through an installment sale contract or a loan agreement which required periodic payments over a specified period of time. Each named appellee had created a security interest in his automobile as collateral security for the indebtedness. The agreements provided that, in the event of default by an appellee, the creditor would have the right to retake the automobile, with or without judicial process—a practice commonly referred to as self-help repossession.[5]

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4 28 U. S. C. § 1343(3).

5 The sale contracts received in evidence in this case provided:

"a. 'In the event the buyer defaults . . . the seller . . . may take immediate possession of said property without demand . . . and for this purpose the seller may in a lawful manner only, enter upon the premises where said property may be and remove same. . . .' (GMAC form.)

"b. 'Upon the occurrence of an event of default . . . Buyer and each Co-Buyer, jointly and severally, hereby authorize and empower Seller or Seller's Assignee . . . to take immediate possession of said car, wherever found, without . . . with or without legal process. . . .' (The Gibbs contract.)

"c. 'If Buyer defaults . . . Seller . . . may enter the premises where the property may be and take immediate possession of the property. . . .' (Chrysler's form.)

"d. 'In the event Buyer defaults . . . Seller shall have . . . the right to repossess the Property wherever the same may be found with free right of entry. . . .' (Ford's form.)

(Continued on following page)

The challenged statutes neither compel nor prohibit peaceable self-help repossession. Section 9-503 of the UCC, 12A Pa. Stat. § 9-503 provides:

> "Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action."

Section 23A of the MVSFA, 69 Pa. Stat. § 623A provides:

> "When the buyer shall be in default in the payment of any amount due under a motor vehicle installment sale contract or when the buyer has committed any other breach of contract, which is by the contract specifically made a ground for retaking the motor vehicle, the seller or any holder, who has lawfully acquired such contract, may retake possession thereof. Unless the motor vehicle can be retaken without breach of the peace, it shall be retaken by legal process, but nothing herein shall be construed to authorize a violation of the criminal law."

The district court found that there was sufficient state involvement to constitute "state action" and held that under *Fuentes v. Shevin*, 407 U.S. 67 (1972), lack of prior notice and an opportunity to be heard renders extra-judicial repossession unconstitutional. Since we believe that the requisite "state action" is not present and that therefore a cause of action under 42 U.S.C.

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e. 'In the event of a default, seller shall have the right to . . . enter any premises and without breach of the peace take possession of the vehicle. . . .' (Girard's installment sale contract.)"

(Continued from previous page)

§ 1983 has not been alleged, we need not reach the due process issue.[6]

It is well-settled that the fourteenth amendment applies only to actions of the "States" and not to actions which are "private." Under 42 U. S. C. § 1983, the "under color of state law" requirement is the same as the "state action" requirement of the fourteenth amendment. *Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 152 n.7 (1970); *United States v. Price*, 383 U. S. 787, 794-95 n. 7 (1966).[6a]

Unlike pre-judgment seizures recently considered by the Supreme Court in which state action was clearly present,[7] the seizures complained of here were effected by private individuals without the aid of any state official. Therefore, absent direct state involvement by the State of Pennsylvania, appellees' claim of "state action" rests on one of two general theories: (1) by comprehensively regulating the field of automobile financing, without prohibiting the practice of self-help repossession, the State of Pennsylvania has become so involved and has so encouraged this private remedy that it becomes "state action," or (2) by allowing the practice of self-help re-

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6 We therefore need not discuss the impact of **Mitchell v. W. T. Grant Co.**, 42 U. S. L. W. 4671 (U. S., May 13, 1974), which was decided subsequent to the district court's decision. **Cf. Calero-Toledo v. Pearson Yacht Leasing Co.**, 42 U. S. L. W. 4693 (U. S. May 15, 1974).

6a We do not express any opinion as to the reach of the fourteenth amendment with respect to "private" action under 42 U.S.C. § 1985.

7 **Mitchell v. W. T. Grant Co.**, 42 U. S. L. W. 4671 (U. S., May 13, 1974); **Fuentes v. Shevin**, 407 U. S. 67 (1972); **Sniadach v. Family Fin. Corp.**, 395 U. S. 33 (1960).

possession, the State of Pennsylvania has abdicated or delegated to private individuals a traditional state function, thus infusing the private act of repossession with "state action."

COMPREHENSIVE STATE REGULATION

Unquestionably the legislature of Pennsylvania, in enacting the MVSFA, comprehensively sought to regulate the area of automobile financing.[8] But the act complained of—i. e., the seizure of appellees' automobiles— is neither compelled[9] nor prohibited by the MVSFA. The statute simply permits what private parties have agreed upon. Section 23 of the MVFSA, 69 Pa. Stat. § 623 provides that the creditor "may re-take possession" peaceably, without resort to legal process, if the default "is by the contract specifically made a ground for re-taking the motor vehicle."

Under the MVSFA, self-help repossession remains a private remedy enforced by purely private conduct pursuant to an agreement made privately and not under state compulsion. Thus, the state plays no significant role. Where, as here, "the impetus for the [act complained of] is private," we are simply unable to conclude, as required under *Moose Lodge v. Irris*, 407 U. S. 163, 173 (1972), that the State of Pennsylvania has "*signifi-*

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8 **See** Report, Joint State Government Commission, 1945-47 (March 21, 1947); 69 Pa Stat. § 602 (preamble to MVSFA).

9 This appeal therefore does not present us with the situation where a "state statute or custom or usage compels the result." **Jackson v. Metropolitan Edison Co.**, 483 F. 2d 754 (3d Cir. 1973), interpreting **Adickes v. Kress**, 398 U. S. 144 (1970).

cautly involved itself" in the alleged conduct so as to constitute "state action." (Emphasis added.)

Nor do we believe that by enacting the MVSFA has the State of Pennsylvania formed a "symbiotic relationship" with creditors as was present in *Burton v. Wilmington Parking Authority*, 365 U. S. 715 (1961). *Cf. Moose Lodge v. Irvis*, 407 U. S. 163, 174-75 (symbiotic relationship lacking).

Nor do we find in the statutory scheme the kind of encouragement and fosterage of the alleged unconstitutional act as in *Reitman v. Mulkey*, 387 U. S. 369 (1967). In *Reitman*, the State constitutional amendment repealed prior state legislation regulating racial discrimination in housing. Thus, in effect, the State constitutionally authorized discrimination by repealing prior law and by substantially inhibiting any subsequent change.[10]

The case before us is vastly dissimilar to the situation in *Reitman*. Appellees concede that the self-help remedy of repossession "existed in some form in the common law from a very early time."[11] Unlike *Reitman* then, the State of Pennsylvania has not by the enactment of the MVSFA permitted a practice which was formerly prohibited. It is true, as appellees suggest, that "the protections surround the use of [this self-help] remedy have continuously

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10 **Cf. Bond v. Dentzer,** No. 73-2377, Slip Opinion at 2105-06 (2d Cir., filed March 13, 1974).

11 Brief of Appellees at 38. For a general discussion of the history of the self-help remedy of repossession, see McCall, **The Past and Prologue: A History of the Right to Repossess,** 47 S. Cal. L. Rev. 58 (1973).

ebbed and flowed."[12] But any encouragement or fosterage of self-help repossession resulting, if at all, from statutory modification of safe guards surrounding this private remedy is indirect and highly conjectural and is simply far less significant than the state involvement in *Reitman*. We think that *Reitman* and *Moose Lodge, supra*, read together, suggest that absent direct state action, private repossessions are not infused with the quality of "state action" unless we can conclude that the involvement of the State of Pennsylvania (through its enactment of the MVSFA) has "significantly" encouraged or fostered self-help repossessions. *Reitman, supra*, 387 U. S. at 380; *Moose Lodge, supra*, 407 U. S. at 173. *See Burton, supra*, 365 U. S. at 772. We cannot so conclude.

Actually, far from encouraging private repossessions, the MVSFA was enacted in 1947, among other reasons, to curb the abuses associated with private repossessions.[13]

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12 Brief of appellees at 38.

13 The preamble to the MVSFA, 69 Pa. Stat. § 602 provides, inter alia:

> "It is hereby determined and declared as a matter of legislative finding:
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> "(a) That an exhaustive study by the Joint State Government Commission discloses nefarious unscrupulous and improper practices in the financing of the sale of motor vehicles . . .
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> • • • •
>
> "(c) That consumers, because of these legal technicalities and because of their unequal bargaining position, are at the mercy of unscrupulous persons and are being intolerably exploited in the installment purchase of motor vehicles. Such exploitation is evident in the unfair provisions of the install-

(Continued on following page)

The statute displays a noticeable concern for protecting a broad range of consumer interests, including, but not limited to, private repossessions.[14] The MVFSA then not only makes it more difficult to repossess, but also, by protecting various other interests of the buyer, indirectly minimizes the circumstances which give rise to repossessions. We think the Second Circuit's characterization of an installment sales financing act of another state is equally appropriate to the MVSFA:

> "The state enactment was ameliorator not regressive; it did not 'move in' on the . . . buyers, but rather on the installment sellers.

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ment sale contract, exorbitant charges for credit, extortionate default, extension, collection, repossession and other charges for credit, unconscionable practices respecting execution of contracts, refinancing of contracts, prepayment, refunds, insurance, **repossession** and redemption.

"(d) That practices enumerated and others equally pernicious, have existed to such an extent that regulation of the installment selling of motor vehicles is necessary to the adequate protection of the public interest. . .

"Therefore, it is hereby declared to be the policy of the Commonwealth of Pennsylvania to promote the welfare of its inhabitants and to protect its citizens from abuses presently existing in the installment sale of motor vehicles, and . . . to establish a system of regulation for the purpose of insuring honest and efficient consumer credit service for installment purchasers of motor vehicles; and to provide the administrative machinery necessary for effective inforcement." (Emphasis added.)

14 Provisions relating to repossession include, **inter alia**: 69 Pa. Stat. § 623(A) (self-help repossession permitted only if effected without breach of peace); 69 Pa. Stat. § 623(B) (repossession effected only by parties to the transaction or others who meet licensing requirements); 69 Pa. Stat. § 623(D) (prompt post-repossession notice); 69 Pa. Stat. § 625 (5-day redemption period); 69 Pa. Stat. § 624 (reinstatement of contract after repossession).

(Continued on following page)

* * * * *

"The partnership, if any, is with the purchaser and not the [sellers]. See Adickes v. S. H. Kress & Co., [398 U. S. 146 (1969)]."

Shirley v. State National Bank, No. 73-1783, Slip Opinion at 1779 (2nd Cir., filed Feb. 14, 1974).

At least an aspect of appellees' argument, distilled to its essence, is that when a state attempts to comprehensively regulate an area of private conduct, its failure to prohibit is equivalent to "state action."[15] Such a rule,

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(Continued from previous page)

Provisions designed to protect other interests of the buyer include, **inter alia**: 69 Pa. Stat. § 615(B) (prohibition of acceleration clauses in the event a seller deems himself to be insecure); 69 Pa. Stat. § 615(F) (prohibition of provision relieving the holder or his assignee from liability for legal remedies which the buyer may have had against the seller); 69 Pa. Stat. § 616 (restriction on assignment of installment sales contract except as to persons licensed as sales finance companies); 69 Pa. Stat. § 618 (additionally costs included in the financing are limited); 69 Pa. Stat. § 619 (finance charges may not exceed specific maximum rates); 69 Pa. Stat. § 632 (no contract clause can operate to waive any provisions of Act intended for benefit of buyers).

15 In their brief appellees argue that the sellers have such a greater bargaining position than do buyers, that they can extract from buyers virtually any advantage not prohibited by law. They then suggest:

> "The only control, in such a situation, is not what extent the weaker party, not even aware of the extent of his obligation, can compel the stronger party to protect his rights, the only control, in reality, is what the law guarantees to the weaker party, or prevents the stronger party from compelling him to forfeit. . . . By enacting the statutes challenged herein, the state has, in a very real sense, determined precisely now repossession will occur. In this context, then, the statutes challenged are not neutral, but actively encourage repossession."

Brief of Appellees at 52.

however, would virtually obliterate the distinction between state and private action. As the Ninth Circuit noted in *Adams v. Southern California First National Bank*, 492 F. 2d 324, 330-31 (9th Cir. 1973):

> "Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept.[15]
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> * * *
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> "15 . . . If we were to accept the debtors' broad test, it would be very difficult to draw any line between state and private action. Indeed, the creditors point out this difficulty when they argue that if any action in conformance with a state law were state action for purposes of the statute (§ 1983) or the constitutional amendment, then the action of the debtors in withholding payments without affording the creditors due process is state action. See [UCC] § 2-717."

Lastly, we reject two other contentions of appellees by noting our agreement with the Ninth, Eighth, Fifth and Second Circuits (1) that private repossesions are not infused with "state action" merely because the state enacted sections 9-503 and 9-504 of the UCC,[15a] *James v. Pinnix*,

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15a At oral argument it was represented that all contracts and agreements in issue and in the record contained default and repossession provisions. We therefore are not faced with reaching a determination of "state action" where the documents on which repossession is predicated are silent as to default and repossession remedies and reliance for repossession is based **solely** on 12A Pa. Stat. § 9-503. Accordingly, we do not reach or decide "state action" in such a situation.

No. 73-1866 (5th Cir., filed June 10, 1974); *Nowlin v. Professional Auto Sales, Inc.*, No. 73-1348 & *Maghugh v. Bill Allen Chevrolet Co.*, No. 73-1450 (8th Cir., filed April 25, 1974); *Shirley v. State National Bank, supra; Adams v. Southern California First National Bank, supra;* and (2) that private repossessions are not infused with "state action" merely because a state issues a certificate of ownership[16] to the secured party enabling it to transfer the automobile to a third party purchaser at a sale following repossession,[17] *Nichols v. Tower Grove Bank*, No. 73-1621 (8th Cir. filed May 13, 1974); *Shirley v. State National Bank, supra; Adams v. Southern California First National Bank, supra.*

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16 See 75 Pa. Stat. § 101, et seq.

17 The district court impliedly agreed with this when it dismissed from the case defendant Titelman, the Director of the Pennsylvania Bureau of Motor Vehicles, under whose direction such certificates are issued. The district court stated:

> Neither Titelman nor any other state officer is clothed with the authority to enforce these statutes [69 Pa. Stat. §§ 623-627; 12A Pa. Stat. §§ 9-503, 9-504]. The alleged deprivation prescribed by the statutes take place before any action or indeed any knowledge on the part of defendant, Titelman, comes into play.
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> * * *
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> 5. The primary purpose of the act [assignment of Certificate of Title] was not designed to establish the ownership or proprietorship of an automobile, but rather to register the name and address of a person having the right to possession, and to furnish persons dealing with one in possession of an automobile a means of determining whether such possession was prima facie lawful. **Semple v. State Farm Automobile Ins. Co.**, 215 F. Supp. 645, 647 (E. D. Pa. 1963).

We agree with the district court's dismissal of Titelman for the reason stated.

DELEGATION OF TRADITIONAL STATE FUNCTION

In *Evans v. Newton*, 382 U. S. 296, 299 (1966), the Supreme Court stated:

> "Conduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action. . . . [W]hen private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."

Although we find no similarity between *Evans* (and the cases cited therein[18]) and the present case, appellees nevertheless suggest and the district court agreed that the State of Pennsylvania has delegated to private individuals a traditional state function, i. e., the power to decide that one's rights are superior to another's and to carry out that decision by seizing another's property. We disagree.

Probably the chief obstacle to concluding that self-help repossession involves a traditional state function is the fact, recognized by the district court and the appellees, that in one form or another the common law very early recognized repossession as a private remedy. As the Ninth Circuit has noted, "[b]ased on this history, it

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18 **Burton v. Wilmington Parking Authority**, 365 U. S. 715 (1961); **Pennsylvania v. Board of Trusts**, 353 U. S. 230 (1957); **Terry v. Adams**, 345 U. S. 461 (1953); **Public Utilities Comm'n v. Pollak**, 343 U. S. 451 (1952); **Marsh v. Alabama**, 326 U. S. 501 (1946).

does not appear likely that the Fourteenth Amendment, when written, was intended to eliminate self-help in light of the prevailing use of peaceful repossession."[19] We do not believe, moreover, that this obstacle can be surmounted by concluding as the district court did that this self-help remedy was not a "historically sound principle of the common law" and that it "ought never have been deemed applicable to the American state of society."

Nor do we believe that the district court was correct in reading *Fuentes v. Shevin*, 407 U. S. 67 (1972), as suggesting that "state action" encompasses any abdication by the state of "the power to decide that your rights are greater than another's."[20] Although *Fuentes* clearly involved state action,[21] the plurality opinion nonetheless spoke of a state's abdication of effective control over "state power."[22] However, contrary to what the district

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19 **Adams v. Southern California First National Bank, supra,** 492 F. 2d at 337, **citing** 2 F. Pollock & F. Maitland, The History of English law 574 (2d ed. 1899).

20 The district court relied upon the following language in **Fuentes**:

> The statutes, moreover, abdicate effective state control over **state power.** Private parties, serving their own private advantage, may unilaterally invoke **state power** to replevy goods from another. No state official participates in the decision to seek a writ; no state official reviews the basis for the claim to repossession; and no state official evaluates the need for immediate seizure. There is not even a requirement that the plaintiff provide any information to the court on these matters. The State acts largely in the dark." 407 U. S. at 93. (Emphasis added by district court.)

21 The state statutes in **Fuentes** authorized creditors to initiate replevin procedures by summary writs issued by state courts and executed by state officials.

22 **See** note 20 **supra** and accompanying text.

court suggested, the "state power" to which *Fuentes* referred was the use of state power in the form of state officers to accomplish the seizures for the creditor. The plurality opinion recognized that at common law a creditor could "invoke *state power*" through the action of debt or detinue or alternatively a "creditor could . . . proceed *without the use of state power*, through self-help, by 'distraining' the property before a judgment.[23] The dissent in *Fuentes* also read the majority opinion as clearly distinguishing between state action and purely private action such as repossession:

> "It would appear that creditors could withstand the attack under today's opinion simply by making clear in the controlling credit instruments that they may retake possession without a hearing, or, for that matter, without resort to judicial process at all." 407 U. S. at 102.

Thus, we find no support for the contention that the State of Pennsylvania has delegated a traditional state function.[24]

We therefore conclude that appellees have failed to show the requisite "state action" necessary to support a claim under 42 U. S. C. § 1983. *Accord, James v. Pinnix*, No. 73-1866 (5th Cir., filed June 10, 1974); *Nicholas v. Tower Grove Bank*, No. 73-1621 (8th Cir., filed May 13, 1974); *Nowlin v. Professional Auto Sales, Inc.*, No. 73-1348

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23 407 U. S. at 79 (emphasis added).

24 **See James v. Pinnix,** No. 1866 (5th Cir., filed June 10, 1974) (finding self-help repossession to involve no delegation of a state function and distinguishing **Hall v. Garson,** 430 F. 2d 430 (5th Cir. 1970), a decision relied upon by appellees).

& Maghagh v. Bill Allen Chevrolet Co., No. 73-1450 (8th Cir., filed April 25, 1974); *Shirley v. State National Bank*, No. 73-1783 (2nd Cir., filed Feb. 14, 1974); *Adams v. Southern California First National Bank*, 492 F. 2d 324 (9th Cir. 1973).[25]

The order of the district court of November 8, 1973 granting the declaratory relief specified in the first sentence of this opinion will be reversed with directions that the district court dismiss appellees' complaint for failure to state a claim under 42 U. S. C. § 1983 upon which relief can be granted.[26]

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25 Decisions finding no "state action" with respect to similar self-help remedies include: **Bickel Optical Lab., Inc. v. Marquette Nat'l Bank**, 487 F. 2d 906 (8th Cir. 1973); **Bond v. Dentzer**, No. 73-2377 (2d Cir., filed March 13, 1974); **Fletcher v. Rhode Island Hosp. Trust Nat'l Bank**, No. 1372, 42 U. S. L. W. 2601 (1st Cir., May 9, 1974).

26 **See Bell v Hood**, 327 U. S. 678, 681-83 (1946); **Adams v. Southern California First National Bank, supra**, 492 F. 2d at 338

APPENDIX II

No. 73-1826

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

WILLIE B. TURNER,
Plaintiff-Appellant,

vs.

IMPALA MOTORS,
Defendant-Appellee.

Appeal from the United States District Court
for the Western District of Tennessee

Decided and Filed September 20, 1974.

Before: WEICK, CELEBREZZE and PECK, Circuit Judges.

PECK, Circuit Judge. Tennessee Code Annotated (T.C.A.) § 47-9-503[1] is the State of Tennessee's statutory implementation of the Uniform Commercial Code's § 9-503 which authorizes a secured creditor to peacefully repossess collateral. The provision is generally known as the self-help repossession provision. This case presents the issue as to whether peaceful repossession under the Tennessee statute is action under the the color of state law within the

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1 47-9-503. Secured party's right to take possession after default.—Unless otherwise agreed a secured party has on default the right to take possession of the collateral. In taking possession a secured party may proceed without judicial process if this can be done without breach of the peace or may proceed by action. If the security agreement so provides the secured party may require the debtor to assemble the collateral and make it available to the secured party at a place to be designated by the secured party which is reasonably convenient to both parties. Without removal a secured party may render equipment unusable, and may dispose of collateral on the debtor's premises under § 47-9-504 [Acts 1963, ch. 81, § 1 (9-503).]

meaning of 42 U. S. C. 1983[2] and state action within the meaning of the due process clause of the Fourteenth Amendment.[3] Upon motion of the defendant-appellee, the District Court dismissed the suit for failure to state a cause of action and this appeal followed. District Judge Garrity has characterized this issue as "one of the liveliest on the current judicial scene." *Boland v. Essex County Bank*, 361 F. Supp. 917 (D. Mass. 1973).[4]

In terms of private repossession, the facts before us offer a classic example. Plaintiff-appellant Turner purchased a 1965 Buick LaSabre in June of 1972 from the defendant-appellee Impala on a conditional sales contract. Turner executed a promissory note specifying a payment schedule of twenty-five dollars per week for twelve weeks, with the remaining balance to be paid at the rate of twenty dollars per week.

The record does not indicate the circumstances of the default but the actual payments were erratic from the beginning. The contract included a provision that "in default of payment of this note, or any part of it, said payee

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2 42 U. S. C. § 1983 (1970): Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding.

3 U. S. Const. amend. XIV, § 1: [N]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

4 This issue was expressly not before this Court in **Huber v. Union Planters National Bank**, 491 F. 2d 846 (6th Cir. 1974).

[Impala] may take possession of said property in any manner they [sic] may elect, and dispose of same without recourse to law. . . ."

Almost seven months after the purchase, Turner apparently defaulted on his note and without notice the auto was repossessed from a curbside on a public street. The incident occurred in the early afternoon of a weekday after Turner parked his auto in front of his mother's house. Turner had left his five-year-old son in the auto and the keys to the auto in his pocket, but the agent of Impala was not deterred. The young child was removed therefrom and the auto sped away. The record indicates that there was no hearing to determine either contractual obligations or the rights to possession.

Turner contends that the Tennessee statute is unconstitutional and that it authorizes a deprivation of property without due process. He principally relies on *Fuentes v. Shevin*, 407 U. S. 67 (1972), which held that notice and a hearing are required before the execution of a pre-judgment writ of replevin. According to the appellant, the Tennessee statute allows a creditor to circumvent the requirements of notice and hearing and yet replevy his property. He contends that although the case ostensibly involves private conduct, the presence of state action is indicated by the fact that the state has intervened, authorized and encouraged repossession by secured creditors by conferring upon them special powers and exemptions from legal requirements placed on all others. Appellant also argues that the Tennessee statute, similar to the replevin statutes in *Fuentes*, deprives the debtor of his rights to notice and an opportunity to be heard. The waiver provi-

sion contained in the contract does not, appellant contends, necessarily exclude the requirements of notice and a judicial hearing on the issue of the waiver prior to the repossession. The waiver provision allows the creditor to take possession upon default.

Before we consider the constitutional dimensions of the matter before us, we must first examine the key question of jurisdictional requisites. The concept of state action as required by the Fourteenth Amendment has been found to be virtually synonymous with the "under color of state law" requirement of § 1983. *United States v. Price*, 383 U. S. 787, 794-95 n. 7 (1966); *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F. 2d 153, 161 (6th Cir. 1973). *But cf., Adickes v. S. H. Kress & Co.*, 398 U. S. 144, 211 (1970) Brennan J., concurring and dissenting). Appellants would have us hold that the self-help repossession which took place upon the default on a private contract providing for such repossession is an act under color of state law and thus constitutes state action within the scope of the Fourteenth Amendment. If the repossession did not constitute state action but rather only an individual invasion of individual rights, the alleged wrong cannot be remedied under the auspices of the Fourteenth Amendment. *Civil Rights Cases*, 109 U. S. 3, 11 (1883).[5] The presence of state action allows the invocation of the basic procedural safeguards announced in *Sniadach v. Family Finance Corp., infra*, and *Fuentes v. Shevin, supra*.

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5 State action has been described as a "catch-phrase." See Black, "State Action," Equal Protection and California's Proposition 14, 81 Harv. L. Rev. 69, 88 (1967).

Instances of private conduct have been found to involve sufficient state action but each such conclusion should be the product of "sifting facts and weighing circumstances. . . ." *Burton v. Wilmington Parking Authority*, 365 U. S. 715, 722 (1961). However, a mere finding that state action is present is insufficient. The state action must rise to the level of significant involvement. *Moose Lodge No. 107 v. Irvis*, 407 U. S. 163, 173 (1971).

The constitutional attacks on creditors' tactics such as peaceful repossession or formal legal processes gained support with Mr. Justice Douglas' majority opinion in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). In that case a garnishment action had been instituted in a state court whose rules allowed the service of summons and complaint upon the alleged debtor's employer. The effect was to freeze the alleged debtor's wages until the merits of the case had been decided. The debtor was not required to be notified at the time of service upon the employer and there was no opportunity for the debtor to obtain a hearing or judicial scrutiny of the creditors' claims. The debtor was restricted to either showing that the suit was brought in bad faith or posting a bond in the amount of the garnishment. With Mr. Justice Black dissenting, the Supreme Court held that the Court Clerk's ex parte issuance of a summons pursuant to the state statute constituted state action and that the prejudgment wage garnishment without prior notice and opportunity for a hearing deprived the debtor of property without due process of law in violation of the Fourteenth Amendment.

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6 See the partial listing of examples cited in **Palmer v. Columbia Gas of Ohio, Inc., supra,** at 161.

Subsequently, the Supreme Court in *Fuentes v. Shevin*, 407 U. S. 67 (1972), speaking through Mr. Justice Stewart, held that certain state statutes providing for the summary seizure of personal property by means of a prejudgment replevin procedure involving the sheriff's execution of a writ issued by a court clerk violated the due process clause of the Fourteenth Amendment insofar as it denied a debtor the right to notice and the opportunity for a hearing prior to the less of any possessory interest in that personal property.[7]

However, in the recent case of *Mitchell v. W. T. Grant Co.*, 42 U. S. L. W. 4671 (U. S., May 13, 1974), it would appear that *Fuentes* has been effectively overruled. *See* concurring opinion of Powell, J., *id.* at 4678, and the dissenting opinion of Stewart, J., *id.* at 4682. In *Mitchell*, judicial sequestration procedures in Louisiana, similar to to the replevin statutes struck down in *Fuentes*, allowed a creditor to obtain, on an ex parte basis from a judicial authority, a writ of sequestration upon submission of an affidavit and posting of a security bond. Thereupon a public official, without providing notice and a hearing to the debtor, seized the property. Distinguishing judicial control over the process from the court clerk's control in *Fuentes*, the Supreme Court found the procedure was not invalid.

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7 Although state action in self-help repossession cases was neither at issue nor discussed in **Fuentes,** the Court noted in contrasting self-help and replevin that creditors may "proceed without the use of state power, through self-help. . . ." **Supra** at 79 n. 12. Self-help and replevin can be distinguished constitutionally on the basis of the state's involvement.

Prior to *Mitchell*, the challenge to the Commercial Code's self-help repossession provisions generated considerable litigation. However, the only federal appellate courts to have met the issue to date have failed to find significant state action present. *Gibbs v. Titelman*, Nos. 74-1062 to 74-1067 (3rd Cir., filed August 1, 1974); *James v. Pinnix*, No. 73-1866 (5th Cir., filed June 10, 1974); *Noclin v. Professional Auto Sales, Inc.*, No. 73-1348 (8th Cir., filed April 25, 1974), citing *Bichel Optical Laboratories, Inc. v. Marquette National Bank*, 487 F. 2d 936 (8th Cir. 1973); *Shirley v. State National Bank of Connecticut*, No. 73-1783 (2d Cir., filed February 14, 1974); *Adams v. Southern California First National Bank*, No. 72-1484 (9th Cir., filed October 4, 1973), *rev'g sub. nom. Adams v. Egeley*, 338 F. Supp. 614 (S. D. Cal. 1972), *petition for cert. filed*, 42 U. S. L. W. 3707 (U. S. June 25, 1974).

It is the district court's opinion in *Adams* that remains the most frequently cited case finding the requisite state action. In that case, the court relied upon *Reitman v. Mulkey*, 387 U. S. 369 (1967), wherein the Supreme Court found that state action existed when private housing discrimination was authorized by a provision of the California constitution. Even though the California constitution did not require discrimination in the sale and rental of housing, the Court stated that the provision in question would "significantly encourage and involve the State in private discriminations" contrary to the Fourteenth Amendment. *Id.* at 381. Similarly, the District Court in *Adams* held that the California enactments of the U. C. C. encouraged and involved the state in private repossession and sale, as demonstrated by their incorporation in the

security agreement. Appellants here have mounted that same challenge.

On appeal, the Ninth Circuit held that there was not sufficient involvement by the State of California to constitute state action. *Adams, supra*, slip opinoin at p. 7. The Court distinguished *Reitman* as being a racial discrimination case having limited application to the self-help repossession cases and relied on the finding that the California statute merely codified the existing common law. The court also rejected the contention that the repossession was effectively a public function.

We are likewise persuaded that *Reitman* cannot be relied upon to justify a finding of state action here. Our opinion in *Palmer* notwithstanding, 479 F. 2d 153 (6th Cir. 1973), we view *Reitman* as dealing with a state attempt to accomplish indirectly what it was prohibited from doing directly. We cannot ignore the fact that the context of onerous racial discrimination in which the case was set demanded special scrutiny. The injustices of racial discrimination cast a different shadow than that of the case now before us.[8] See *Oller v. Bank of America*, 342 F. Supp. 21, 23 (N. D. Cal. 1972).

Our opinion in *Palmer* likewise responded to a different circumstance. There we considered the policies of a company with monopolistic character whose business was

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8 Although we recognize that the Civil Rights Act has application to cases involving the deprivation of property rights as well, see **Lynch v. Household Finance Corp.**, 405 U. S. 538 (1972), and **Goldberg v. Kelly**, 397 U. S. 254 (1970), we are still faced with the problem of finding the presence of state action.

to provide a necessity of life and whose activities and operations were pervasively and significantly regulated by governmental and quasi-governmental regulations and statutes. We therefore concluded that the state thereby achieved a position of joint participation with the company. *Id.* at 165. *See also Burton v. Wilmington Parking Authority, supra* at 726.[9]

Appellant makes the principal point that the private activity before us should be viewed as encouraged by the statute and therefore a finding of state action is justified. While acknowledging that the point has a measure of merit, we do not find it persuasive.

It is clear that in this case the state did not exert any control or compulsion over the creditor's decision to repossess. The private activity was not commanded by the simply permissive statute. While mere existence of the statute might seem to suggest encouragement, we conclude that the effect of the statute is only to reduce a creditor's risk in making repossessions. As a practical matter, a creditor's decision is more likely to be principally influenced by the economics of the situation than by the presence of a permissive statute.

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9 But compare, **Moose Lodge No. 107 v. Irvis,** 407 U. S. 163 (1972), where the Supreme Court stated that it would not base a holding of state action upon a mere finding that "the private entity receives any sort of benefit or service at all from the State, or [that] it is subject to state regulation in any degree whatever. . . . [Such] a holding would utterly emasculate the distinction between private as distinguished from state conduct." 407 U. S. at 174.

We fail to see where the creditor has sought to invoke any state machinery to its aid.[10] Rather, the creditor has simply relied upon the terms of its security agreement pursuant to the private right of contract. Compare *Shelley v. Kraemer*, 334 U. S. 1 (1948). Assuming that the statute was non-existent, the remedy of self-help repossession could still be utilized based on its common law heritage[11] and the private right to contract. We fail to see how the creditor is attempting to enforce any right in reliance upon a constitutional or statutory provision as in *Reitman* or is even asserting any state-created right. Rather, we see a creditor privately effectuating a right which was created in advance by contract between the parties. At best, the right is one that is merely codified, but not created, in the statute.[12]

Appellant also argues that the statute authorizes an individual to perform the governmental function of seizing private property. As stated previously, the statute merely codified and did not create any right or state power. Were we to rely upon the mere fact of codification, we would in part be making available to a complex matrix of human behavior, as regulated by statutes, the scope of federal remedies. We decline to establish that precedent,

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10 See **Watson v. Kenlick Coal Co.**, No. 73-2234 (6th Cir., filed June 21, 1974).

11 The common law of Tennessee allowed repossession of personal property under conditional sales contracts without resort to legal process where the purchaser had agreed to repossession as a contractual matter. **Morrison v. Gaylon Motor Co.**, 16 Tenn. App. 394, 64 S. W. 2d 851 (1932).

12 Insofar as **Palmer**, 479 F. 2d 153 (6th Cir. 1973), is inconsistent herewith, it is modified.

APPENDIX III

5518

Robert BOWMAN, Plaintiff-Appellant,
v.
CHRYSLER CREDIT CORPORATION,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Mississippi.

Before COLEMAN, CLARK and GEE, Circuit Judges.

PER CURIAM:

This case began as a suit for damages in the state court and was removed to the United States District Court on diversity of citizenship and jurisdictional amount. On a trial to the Court without a jury judgment was awarded the defendant. We affirm.

The basis for the suit was that Chrysler Credit Corporation, from a public street, had peaceably repossessed an automobile, unlocked and with the ignition key in it, belonging to the plaintiff-appellant, Robert Bowman. The automobile was the subject of a conditional sales contract, assigned to Chrysler, and was in default for failure to comply with certain insurance provisions of the contract. The contract provided that upon default by Bowman the owner of the contract could repossess the automobile. The taking, with no state participation, did not violate the due process clause of the Fourteenth Amendment, *James v. Pinnix* [5 Cir., 1974], 495 F. 2d 206.

Neither did it violate Mississippi law, *Martin v. Cook*, 237 Miss. 267, 114 So. 2d 669 (1959).

Consequently, the judgment for Chrysler was correct.

As an additional ground of recovery, Bowman alleged that a sum of money left in the glove compartment of the automobile had been taken by those who seized the automobile. The District Court found this contention to be incredible, a finding which, on the evidence, is not clearly erroneous.

The judgment of the District Court is
Affirmed.

APPENDIX IV

JOHN DEERE COMPANY OF KANSAS CITY,
Plaintiff-Appellee,

vs.

JOHN CATALANO,
Defendant-Appellant.

September 3, 1974

MR. CHIEF JUSTICE PRINGLE delivered the Opinion of the Court.

This appeal arises out of an action to recover the unpaid balance on a retail credit sales agreement and the collection costs incurred therein. The appellee, John Deere Company, was the holder of the instrument at the time the debtor appellant, John Catalano, defaulted. John Deere took possession of the security, sold it at public sale and sued Catalano for the deficiency. Judgment was entered for the amount of the deficiency, interest thereon and attorney's fees. Catalano appeals.

To put the case in proper perspective, we set out the facts in detail. On August 11, 1969, Catalano purchased a used combine from Colorado Farm Equipment Company. He signed a retail installment contract and security agreement in which he agreed to make a down payment of $1,544 and to pay the balance of $4,591.23 in three installments of $1,530.41 per installment. The contract provided that:

> "In the event of default, holder may take possession of the GOODS and exercise any other remedies provided by law.
>
> "This note shall be in default if I . . . shall fail to pay any installment when due . . . and in any such event the holder may immediately and without notice declare the entire balance of this note due and

payable together with all expenses of collection by suit or otherwise, including reasonable attorney's fees."

Catalano made the down payment. The local implement store assigned the contract to John Deere Company. The first installment fell due on August 1, 1970. Catalano made no payment. A John Deere retail credit representative contacted Catalano. Catalano asked the agent for an additional three or four weeks to make payment. The agent agreed. Catalano again failed to pay the installment. The representative offered to accept one-half the August installment at that time and the other half on January 1, 1971. Catalano responded that he did not have any money and could not pay. The agent told him that without some payment the company would have no alternative but to repossess the equipment. Catalano stated that he could not pay until January, 1971. The agent explained that the combine would be sold at auction and if it did not bring as much as the outstanding debt against it, Catalano would be liable for the deficiency.

The agent left Catalano's farm and went back to Alamosa. He and a mechanic then returned to the farm. They got the combine ready for the road, and the mechanic drove it back to Alamosa. Catalano was not present when the combine was taken from his farm, and no one protested or resisted its removal.

Notice of sale was published in the local paper. Five or six dealers in John Deere equipment were contacted and two pre-sale bids were received. Nine persons appeared at the sale including Catalano. Roy Nelson, Catalano's neighbor and partner in business, purchased the combine for $2800. Shortly after the sale, Catalano

borrowed money from a local bank and purchased the combine from Nelson for $2810.

John Deere filed suit in Arapahoe County District Court for the deficiency of $1,300.59 remaining on the contract plus the accrued interest. On Catalano's motion, the action was transferred to the district court for Alamosa County. At a trial to the court, John Deere was awarded judgment of $1,638.84 plus costs and attorney's fees of $1,500.

On appeal, Catalano asserts that (1) John Deere's repossession and sale of the security was an unconstitutional taking of his property without due process of law and (2) the award of $1,500 for attorney's fees is excessive as a matter of law. We find no merit with either of these contentions and, therefore, affirm the trial court's judgment.

I.

Catalano argues that due process requires that he should have been given a proper notice and an opportunity to be heard in court before his property was repossessed, and that John Deere's failure to follow this procedure requires the deficiency judgment to be set aside.

In *Fuentes v. Shevin*, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556, the United States Supreme Court struck down, as violative of due process, prejudgment replevin statutes which allowed the seizure of goods by state agents upon an *ex parte* application of the secured creditor. The Court held that the due process clause requires the state to provide a debtor, who is in possession of the security,

with a hearing on the issue of whether he has a right to continued possession *before* the seizure of the goods on behalf of the secured party. However, in *Mitchell v. W. T. Grant Company*, — U. S. —, 94 S. Ct. 1895, 40 L. Ed. 2d 406, the court retreated from this broad principle in upholding Louisiana's sequestration statute. (See J. Powell's concurring opinion). Mr. Justice White, writing for the majority stated, that *Mitchell* "will not affect recent cases dealing with garnishment or summary self-help remedies of secured creditors or landlords." For the purpose of this review, we assume that the holding of *Fuentes* would require a prior hearing if the state is sufficiently involved in the repossession so as to invoke the due process clause of the Fourteenth Amendment.

Catalana maintains the enactment of C.R.S. 1963, 155-9-503 (Vol. 7A) satisfies the state action requirement. That provisions provides:

> "Unless otherwise agreed, a secured party has on default the right to take possession of the collateral. In taking possession, a secured party may proceed without judicial process if this can be done without breach of peace . . ."

He cites only *Adams v. Egley*, 338 F. Supp. 614 (Cal. S. D. 1972) for support of his contention. *Adams* holds that the enactment of an identical provision for self-help in the California Commercial Code was sufficient state involvement in the acts of summary repossession to invoke the Fourteenth Amendment. That district court decision, however, was reversed by the Ninth Circuit in *Adams v. Southern California First National Bank*, 492 F. 2d 324 (9th Cir. 1973). The Ninth Circuit held that the state involvement did not rise to the level of state action. Therefore, the

circuit court found no cognizable federal claim under the Fourteenth Amendment.

In addition to the *Adams* case, numerous courts have ruled on the issue presented here. The overwhelming majority, including the United States District Court for the District of Colorado have found the requisite state action lacking. *Kirksey v. Theilig*, 351 F. Supp. 727 (D. Colo. 1972); *Gibbs, et al. v. Titelman, et al.*, — F. 2d — (3d Cir. Aug. 1974); *Shirley v. State National Bank of Conn.*, 493 F. 2d 739 (2d Cir. 1974); *Oller v. Bank of America*, 342 F. Supp. 21 (N. D. Cal. 1972), *aff'd.; Adams v. Southern California First National Bank, supra*; *Greene v. First National Exchange Bank of Va.*, 348 F. Supp. 672 (W. D. Va. 1972); *Pease v. Hardock National Bank*, 351 F. Supp. 118 (D. Neb. 1972); *Baker v. Keeble*, 362 F. Supp. 355 (M. D. Ala. 1973); *Nichols v. Tower Grove Bank*, 362 F. Supp. 374 (E. D. Mo. 1973); *Shelton v. General Electric Credit Corp.*, 359 F. Supp. 1079 (M. D. Ga. 1973); *Kipp v. Cozens* (Cal. App.) — P. 2d —, (decided July 1974); *Brown v. United National Bank of Oregon*, — Or. —, 509 P. 2d 442; *Messenger v. Sandy Motors Inc.*, 121 N. J. Super 1, 295 A. 2d 402; *Giglio v. Bank of Delaware*, — Del. Ch. —, 307 A. 2d 816; *Northside Motors of Florida, Inc. v. Brinkley*, — Fla. —, 282 So. 2d 617.

We believe the majority represents the better reasoned decisions and we see no reason to elaborate extensively on their reasoning. Suffice it to say, that in Colorado, as elsewhere, the state's traditional rule has been to allow the secured creditor to repossess the security if the contract so provides and the repossession does not "breach the peace." In such cases, the creditor was not liable for con-

version. *International Harvester Co. of America v. Lawrence Inv. Co.*, 95 Colo. 523, 37 P. 2d 529; *Hurt v. Hubbard*, 41 Colo. 505, 92 P. 908; *Horn v. Reitler*, 12 Colo. 310, 21 P. 186. While the enactment of section 155-9-503 of the Uniform Commercial Code provides for self-help repossession in absence of contrary contract provisions, it adds nothing to the situation where the parties have previously agreed on such a remedy and the procedure is carried out without significant state help. As the minority in *Fuentes v. Shevin*, *supra*, points out, the majority opinion clearly distinguishes between the state action interdicted in Fuentes and private repossession authorized by agreement between the parties. We find no violation of the Fourteenth Amendment or our own due process clause present here. A cogent capsulized argument supporting this position appears in 44 U. COLO. L. REV. 389, 408-412.

Certainly as applied to the case at bar, the equities are with the creditor. John Deere gave Catalano every opportunity to avoid default. Only after Catalano refused to make any effort to pay and, was informed that John Deere had no choice but to repossess the combine, did John Deere resort to repossession. Hence, as applied here, the statute is not unconstitutional.

II.

Secondly, Catalano maintains that the award of $1,500 for John Deere's attorney's fees should be set aside. He argues the fee of $1,500 was excessive considering the fact that the fee is based upon a claim for a deficiency judgment of $1,300.59.

John Deere retained a Denver attorney. This action was filed in the district court of Arapahoe County for a deficiency judgment of $1,300.59, interest, and attorney's fees. The claim for attorney's fees on a contract provision in the security agreement provided for "all expenses of collection by suit or otherwise, including reasonable attorney's fees." Catalano filed a motion for a change of venue to the district court for Alamosa County. John Deere confessed the motion and the motion was granted. Catalano filed an answer denying the allegations of the complaint and in a pretrial motion to dismiss he raised the constitutional issue with which we dealt above. At the trial, John Deere's attorney testified that he spent 5½ hours on the case which included investigation of the claim, research on the constitutional issue, travel time and proceedings before the court. One and one-half hours of that time was spent on the change of venue motion. He further testified that John Deere agreed to pay $30 an hour for his time and that it was a reasonable rate for this type of work. An Alamosa attorney also testified that $30 an hour was a reasonable rate to charge in this case. The trial court excluded the time spent on the change of venue motion, and based on the contract provisions for reasonable attorney's fees, it awarded John Deere $1,500 for the fees incurred in the action.

Catalano argues that 1971 Perm. Supp., C. R. S. 1963, 73-2-413, imposes a statutory limitation on attorney's fees of fifteen percent of the unpaid debt after default. However, 1971 Perm. Supp., C. R. S. 1963, 73-9-101(3) provides that:

"(3) Transactions entered into before October 1, 1971, and the rights, duties, and interests flowing from

> them thereafter, may be terminated, completed, consummated, or enforced as required or permitted by statute, rule of law, or other law amended, repealed, or modified by this code as though the repeal, amendment, or modification had not occurred, but this code applies to: . . ."

Since the transaction was entered into prior to October 1, 1971 and the attorney's fees provision is in article 2 and not article 5 of the Code, the limitation of section 73-2-413 does not apply to the case at bar.

Catalano next contends that the award is unreasonable as a matter of law because it exceeds the amount of the underlying deficiency judgment. In effect, Catalano maintains that a hypothetical creditor would not have agreed to pay attorney's fees of $1,500 on a claim worth $1,300.59 and, therefore, he should not be bound by the agreement between John Deere and its attorney. Firstly, we note that the judgment including interest exceeds the attorney's fees awarded here. Secondly, Catalano cites no authority for this proposition and we have found none. Thirdly, the equities in this action do not favor Catalano. He was given every opportunity to avoid default. He was told that John Deere would have no choice but to repossess the combine. He obtained a loan from the local bank to repurchase the machine from a neighbor who purchased it at the auction. As the trial court pointed out,

> "[Catalano's] actions of repurchasing the combine through his business partner and neighbor were a calculated risk that he chose to obtain his property at a lesser price than what he had agreed to pay originally."

He made a bad business judgment. He forced John Deere to prosecute a lawsuit to obtain its due. Finally, the record

supports the reasonableness of the award. *Waterman v. Sullivan*, 156 Colo. 195, 397 P. 2d 739. Under such circumstance, the award does not shock our conscience, nor is it void as against public policy. Therefore, the trial court's judgment is not excessive as a matter of law. *Florence Oil & Refining Co. v. Hiawatha Oil, Gas & R. Co.*, 55 Colo. 378, 135 P. 454.

Accordingly, the judgment is affirmed.

MR. JUSTICE DAY AND MR. JUSTICE LEE do not participate.

APPENDIX V

ROSA E. SIFUENTES, individually and on behalf of all others similarly situated

Plaintiffs-Appellants,

v.

HUGH C. WEED, JR., individually and in his capacity as Director of the Colorado Department of Revenue, and GENERAL MOTORS ACCEPTANCE CORPORATION, a New York corporation, and BILL DREILING MOTOR COMPANY, a Colorado corporation

Defendants-Appellees.

September 3, 1974.

MR. CHIEF JUSTICE PRINGLE delivered the Opinion of the Court.

The automobile of plaintiff Rosa E. Sifuentes was repossessed by defendant General Motors Acceptance Corporation (GMAC) on November 16, 1972, for an alleged default on an installment sales contract. On December 14, 1972, plaintiff filed this class action in the District Court in and for the City and County of Denver, seeking to have certain statutes concerning the issuance of certificates of title and registration to repossessed motor vehicles declared unconstitutional and to enjoin the Director of the Department of Revenue of the State of Colorado from issuing a certificate of title or registration pursuant to these statutes. Subsequently, GMAC and Bill Dreiling Motor Company were joined as defendants. Defendants moved to dismiss and plaintiff moved for judgment in her favor. The trial court denied plaintiff's motion and granted the motion to dismiss. Plaintiff appeals from this order.

The facts in this case are undisputed. On July 27, 1971, plaintiff purchased a 1969 Pontiac automobile from Bill Dreiling Motor Company. She made a down payment and executed an installment sales contract. Dreiling retained a security interest in the automobile for the balance of the purchase price. The contracts provided that:

> "In the event buyer defaults in any payment due hereunder, . . . the seller shall have the right . . . to declare the unpaid balance . . . to be immediately due and payable. Further in any such event, seller . . . may take immediate possession of said property without demand . . . and for this purpose seller may enter upon the premises where said property may be and remove the same. . . .
>
> "In the event of repossession of said property the seller shall have the rights and remedies provided and permitted by law including the right to apply the proceeds of disposition to the reasonable expenses of retaking, holding, preparing for sale, selling and the like, reasonable attorney's fees as provided in provision 4 above, legal expenses incurred and satisfaction of indebtedness. Any surplus shall be paid to the buyer or as otherwise required by law. The buyer shall be liable for any deficiency.
>
> "The requirement of reasonable notification of the time and place of any public or private sale or other intended disposition shall be met if notice thereof is mailed, postage prepaid, to the buyer and any other person entitled thereto ten (10) days prior to such sale or other disposition of the property."

Dreiling assigned its rights to GMAC. The mortgage was filed with the Department of Revenue. Pursuant to C. R. S. 1963, 13-6-23(1)(c), the certificate of title was transmitted by the Department to GMAC who retained possession of the certificate. Plaintiff defaulted on the

payments. On November 16, 1972, GMAC repossessed the car. The repossession was without judicial process and did not involve a breach of the peace. Pursuant to C. R. S. 1963, 155-9-504, notice of public sale of the automobile was sent to the plaintiff. At the sale, GMAC purchased the vehicle. Plaintiff's counsel witnessed the sale. GMAC applied to the Department of Revenue for a new certificate of title. It is this action which the plaintiff seeks to enjoin.

On appeal, plaintiff does not contest the constitutional validity of the actions of GMAC in repossessing or selling the automobile, albeit they were governed by article nine of the Uniform Commercial Code. Rather, she argues that the Department of Revenue cannot constitutionally issue a new certificate of title without first notifying the debtor of the application and giving her an opportunity to show that GMAC is not so entitled. Without such a hearing, she contends, the Department acts largely in the dark in determining whether or not to issue a new certificate. She asserts that she stands to lose, if the new certificate is issued, her intangible right to use and dispose of the automobile.[1] Therefore, this statutory scheme is violative of the due process clause of the Colorado and federal constitutions. The defendants maintain that the mere issuance of a new certificate to GMAC does not deprive the plaintiff of any significant property rights. Therefore due process does not require that plaintiff be given notice or an op-

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1 On stipulation of facts, plaintiff has admitted that she has no interest in the car so as to defeat GMAC's claim of ownership. Nor does she allege any injury in fact. Therefore, in a technical sense she lacks standing to challenge the validity of the scheme. We choose, however, to dispose of her claim on the merits.

portunity to be heard before the Department. We agree with the defendant's contention and, therefore, affirm.

Our concern here is with the question of whether the statutes of the State of Colorado dealing with the issuance of certificates of title to motor vehicles to repossessors of motor vehicles comprise significant state involvement in the repossession activity so as to constitutionally require a hearing before a new title can issue to the repossessor.

The purpose of the Colorado Certificate of Title Act is well stated by Chief Justic Stone in *First Nat. Bank of Ogallala, Neb. v. Chuck Lowen, Inc.*, 128 Colo. 104, 108, 261 P. 2d 158:

> "Under our former policy in Colorado, the validity of chattel mortgages as to innocent third parties was dependent on recording or filing them in the office of the proper county clerk, analogous to the provisions for protection of title to real estate. However, the mobility of motor vehicles and their frequent sale in states far distant from the county of the mortgage filing has resulted in a new method of protection by means of showing mortgages on the title certificate, which can be carried with the car, rather than by record in the files of a distant and probably unknown county."

It is a recording act by which prior interests can be ascertained and protected. *See Loye v. Denver United States Bank*, 341 F. 2d 402 (10th Cir. 1965). Nevertheless the certificate of title is only prima facie evidence of all matters therein contained. C. R. S. 1963, 13-6-7(2). *Frederico v. Universal C. I. T. Credit Corporation*, 140 Colo. 145, 343 P. 2d 830. *See Nichols v. Tower Grove Bank*, 362 F. Supp. 374, 378 (E. D. Mo. 1973).

The activity of the Director of Revenue under our statute and case law in the issuance of a new title to a repossessor of a motor vehicle is strictly limited to the ministerial duty of providing prima facie evidence of what has already occurred by purely private action, namely, the transfer of title from the debtor to the creditor in a manner specifically provided for by their agreement. *See John Deere Co. v. Catalano*, — Colo. —, — P. 2d —, (Supreme Court No. 26328, decided contemporaneously with this opinion). It does not in any meaningful way involve the Director in the repossession and subsequent transfer of ownership to the repossessor. *Kirksey v. Theilig*, 351 F. Supp. 727 (Colo. 1972). *See Nichols v. Tower Grove Bank and Trust Co.*, 362 F. Supp. 374 (E. D. Mo. 1973); *Kipp v. Cozens*, (Cal. App.) — P. 2d —, (decided July 1974). Under the circumstances we find the issuance of the title certificate to a repossessor involves no deprivation of due process as contemplated by the Fourteenth Amendment or our state constitution. It may be that repossession of automobiles or any other property sold on time payment with an express agreement permitting such repossession without notice may be resulting in great abuses, and controls are needed. If so, the regulation of this abuse is a matter for the legislature, not the courts. We have today pointed out in *John Deere v. Catalano, supra*, the distinction between the matter involved here and in *Fuentes v. Sherin*, 407 U. S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556 and also the areas to which *Fuentes* has been limited.

II.

Secondly, the plaintiff challenges the constitutionality of C. R. S. 1963, 13-3-15(3) in that it provides for automatic termination of her current registration upon repossesion. She contends that by allowing revocation of registration without first determining whether the repossession was proper, the statute operates over-inclusively because in some cases the repossession may be wrongful. In those cases the state has no interest in revoking the registration. To remedy this possibility, she contends, a hearing must be afforded before any registration is revoked.

The plaintiff misapprehends the nature of automobile registration. The registration of vehicles is primarily a taxing scheme whereby the owner of a vehicle is assessed an annual fee in lieu of an ad valorem tax on his vehicle. 1969 Perm. Supp., C. R. S. 1963, 13-3-32. It applies, with some exceptions, to all vehicles which are owned by Colorado residents and are primarily designed to be operated on Colorado highways. C. R. S. 1963, 13-3-1 and 2. If the vehicle is not to be operated on Colorado highways, the owner is not required to pay the ownership tax. C. R. S. 1963, 13-3-8.

To implement this scheme, C. R. S. 1963, 13-3-15(1) provides for a pro rata credit of the registration tax when an owner of a registered vehicle transfers his interest in the vehicle. This tansfer can be by operation of law. C. R. S. 1963, 13-3-15(3) provides in part:

> "In the event of a transfer by operation of law of the title or interest of an owner in and to a vehicle, as upon . . . repossession upon default in performing

> the terms of a lease or executory sales contract, chattel mortgage or otherwise, the registration thereof shall expire and the vehicle shall not be operated upon the highway until and unless the person entitled thereto, shall apply for and obtain the registration thereof. . . ."

Contrary to plaintiff's assertion that this scheme is "oppressive", we find it is equitably tailored to tax those who have an opportunity to operate a vehicle on Colorado highways. When plaintiff's car was repossessed, she was no longer able to operate her car on the highways. She then became entitled to a tax credit for the remainder of the year. If she has the car returned to her or purchases another one, with proper application and payment of a pro rata tax, she can obtain a new registration. The law is designed to be equitable. Certainly plaintiff is not deprived of any property right by its enforcement.

The judgment is affirmed.

MR. JUSTICE DAY AND MR. JUSTICE LEE do not participate.